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IN THE

Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should resolve the conflict among the various circuits, extensively identified by the First Circuit in Footnote 2 of its decision, on whether a Fed. R. Civ. P. 24 intervenor can enlarge the issues in the case beyond those that the original plaintiff and defendant wish to litigate?

Whether, if the answer to the first question is yes, a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III? *Diamond v. Charles*, 476 U.S. 54 (1986) (leaving this question unanswered).

Whether a governmental entity, which makes use of a racial classification can satisfy the compelling governmental Interest prong of strict scrutiny by allowing a third party to intervene for the purposes of stepping into the shoes of the governmental entity and substituting the third party's justification for the governmental actors' use of race for the actual compelling governmental interest of the governmental actor?

Whether an intervenor can introduce post-enactment evidence to justify the use of race by a governmental actor?

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs below, are Winifred N. Cotter, Vincent J. Difazio, John P. Doris, William J. Dwan, William G. Knecht, Michael, Locke, Patrick L. Murphy and Thomas L. Sexton.

The respondents, proposed intervenors-defendants below, are: the Massachusetts Association of Minority Law Enforcement Officers, Dennis A White, and Harold White.

The defendants below are: the City of Boston and James J. Hartnett, Jr., Personnel Administrator for the Commonwealth of Massachusetts Executive Office for Administration and Finance, Human Resources Division.

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OPINIONS BELOW

The opinion of the First Circuit of July 17, 2000 is attached hereto in Appendix A.

JURISDICTION

On July 17, 2000, the First Circuit Court of Appeals reversed a decision of the District Court, dated November 23, 2000. A petition for rehearing en banc was denied on August 10, 2000.

Under 28 U.S.C. §1254, this Court has jurisdiction to review judgments of courts of appeal. "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the Fourteenth Amendment to the Constitution of the United States:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The case also involves issues under Article III of the Constitution of the United States:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..."

STATEMENT OF THE CASE

The Petitioners ask this Court to grant their petition for certiorari to resolve a dispute among the various Circuit Courts of Appeal concerning enlargement of the issues under Fed. R. Civ P. 24. This issue was specifically identified by the First Circuit in Footnote 2 of its decision as being in conflict between the various Circuit Courts of Appeal thus leaving the question unresolved. Closely related to the Rule 24 question is whether such enlargement requires Article III standing, a matter left unresolved by this Court in *Diamond v. Charles*, 476 U.S. 54 (1986). Finally, the Petitioners seek review of whether or not the requirement of strict scrutiny that a governmental actor must have a compelling governmental interest can be avoided by the substitution of a non-governmental actor's retroactive justification for the use of race by the governmental actor.

Respondent Intervenors, a racially exclusive private organization of minority officers, and two of its members, seek to intervene in this lawsuit where the Petitioners are suggesting that the 1996 Exam might have discriminated against them in the promotion process within the Boston Police Department ("BPD"). Since race was used in the promotion process in order to exclude the Petitioners from consideration, strict scrutiny is the appropriate level of review. However, the Respondent Intervenors seek to offer an "interest" of their own in order to satisfy the compelling governmental interest prong of strict scrutiny on behalf of the governmental actors even though the governmental actors did not rely on such "interest" in making

their race based decision. This Court must overturn the First Circuit's decision, which would allow the Respondent Intervenors to introduce their third party, retroactive, non-governmental interest in order to circumvent strict scrutiny and this Court must resolve the conflict among the various Circuits (as identified by the First Circuit in Footnote 2 of their decision) concerning whether an intervenor can enlarge issues beyond those raised by the original plaintiffs and defendants in the lawsuit.

A. FACTS BELOW

On October 19, 1996, an examination ("Exam") was given to Boston police officers for the purpose of determining who would be promoted to the rank of sergeant in the BPD. The examination was administered by the Test Administration Group of the Commonwealth of Massachusetts Human Resources Division ("HRD"). All of the Petitioners took the Exam.

A list of 69 candidates eligible for promotion to the rank of sergeant was generated by HRD based solely upon the 69 highest scores on the certification list. The BPD, in conjunction with the HRD, promoted officers to the rank of sergeant from that list. The highest score was 92 and the lowest score was 82. Candidates are arranged in alphabetical order in each score (thus all candidates with a score of 84 were listed in alphabetical order after all candidates who had a score of 85). In the score group of 84, 3 were African American (the "3 African American Officers"), and 10 were Caucasian officers, 8 of whom are the Petitioners.

The BPD determined that they would promote 30 police officers to the rank of sergeant. The BPD in-

formed HRD that the BPD had selected the 3 African American Officers for promotion to the position of sergeant, notwithstanding the fact that they had a worse certification score than other, Caucasian, officers and exactly the same score as the Petitioners.

The BPD never established or even alleged that the 3 African American Officers were victims of discrimination by the BPD and it never even suggested that the Exam was unfair. As such BPD failed to identify a compelling governmental interest to justify the use of race in selecting the 3 African American Officers.

The BPD specifically states in a letter to HRD that the selection rationale of the 3 African American Officers was based on statistical analysis conducted by the BPD which indicated that in order to avoid an "adverse impact" at least three African American officers had to be promoted. The adverse impact referred to by the BPD can only be a reference to the decrease in the percentage of sergeants below 16.17%. Thus, the BPD intended to maintain the percentage of African American sergeants at 16.17%. The failure to promote the 3 African American Officers would result in a failure to maintain the racial percentage of African American sergeants at 16.17%. Therefore, 16.17% was a quota established by the Defendants. This quota was not established as an official quota or affirmative action policy by the BPD or HRD nor was it the result of a court order.

HRD informed the BPD that the BPD's justification for the use of race was unacceptable. Based upon HRD's rejection of the BPD's justification for promoting the 3 African American Officers, the BPD wrote a letter to the Personnel Administrator of the Common-

wealth of Massachusetts on June 8, 1998. The BPD specifically states:

> "In order to maintain the promotional status of the three African American officers, [the Commissioner] filed a Public Safety Civil Service Requisition for six sergeant vacancies on May 5, 1998. [The] intent was to promote the six Caucasian officers who had been initially bypassed in order to promote the three African American candidates who had scored lower on the promotional examination." (emphasis added)

This "admitted" racial goal was intended to and did exclude Petitioners for promotions because only the 3 African American Officers with a score of 84 were preselected. None of the Caucasian officers with a score of 84 were preselected or even considered. No minority officers were bypassed for promotion to sergeant within the score group of 84. Only Caucasian officers were bypassed in the score group of 84.

B. THE INTERVENTION

The Respondent Intervenors, a racially exclusive organization of minority officers and two of its members sought to intervene as co-defendants. The District Court correctly denied intervention. The First Circuit, however, reversed the District Court and allowed intervention based upon the Respondent Intervenors' suggestion that they might challenge the fairness of the Exam even though the Exam was not being challenged by the Petitioners. The Respondent Intervenors are attempting to intervene in order to justify the governmental actors' discrimination against the Petitioners. The Respondent Intervenors are not

claiming to be damaged by the use of race against the Petitioners. The Respondent Intervenors have not filed any action against the Defendants charging that the Exam was unfair or unconstitutional. Respondent Intervenors do not seek to alter or eliminate the Exam. Therefore, the Respondent Intervenors' suggestion that the Exam might be unfair is so speculative so as to fall far short of any reasonable standard for intervention or strict scrutiny. If the Respondent Intervenors want to suggest that they might have a claim as to the fairness of the Exam, such possible claim is separate and distinct from the Petitioners' and is incompatible with the litigation of the Petitioners' claims since the discrimination in question took place after the Exam and unrelated to the Exam. The Respondent Intervenors' recourse is to institute a separate action challenging the validity of the Exam if they can meet Article III standing requirements and statute of limitations issues.

The First Circuit's decision impermissibly alters this Court's well established standard of strict scrutiny. The Respondent Intervenors have been allowed by the First Circuit to intervene for the purpose of "defending" the governmental actors by suggesting that they might accuse the governmental actors of administering an allegedly unfair Exam in the promotion process. A troubling aspect of the First Circuit's decision is that it was made even though the governmental actors are assenting to this intervention which, in effect, might charge the governmental actors with discrimination. Collusion seems apparent. The apparent willingness and/or need of the governmental actors to assent to the intervention even though the intervenors might accuse the governmental actors of discrimination indicates that the governmental actors

must manufacture a reason for the use of race against the Caucasian officers. Even though there was never a direct assertion that the Respondent Intervenors actually were going to challenge the Exam, the First Circuit based its justification for intervention on the fact that the Respondent Intervenors were going to challenge the Defendants' use of the Exam, the First Circuit's decision is necessarily premised on the fact that the Respondent Intervenors' retroactive analysis of the Exam could be substituted for the governmental actors' compelling governmental interest. The First Circuit's decision would allow the Defendants to escape the requirements of strict scrutiny by avoiding the obligation of demonstrating their own compelling governmental interest. In order for strict scrutiny to retain its purpose, this Court cannot allow the substitution of a non-governmental entity's retroactive justification for the compelling governmental interest of the governmental actors.

The First Circuit struggled mightily with the complications inherent with an analysis of Article III standing and Fed. R. Civ. P. 24 intervention. That struggle need not be considered since any justification proposed by a non-governmental actor to justify the governmental actor's use of race is irrelevant under the standards of strict scrutiny.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S COMPELLING GOVERNMENTAL INTEREST REQUIREMENT OF STRICT SCRUTINY CANNOT BE CIRCUMVENTED BY A THIRD PARTY INTERVENING FOR THE PURPOSES OF STEPPING INTO THE SHOES OF THE GOVERNMENTAL DEFENDANTS AND SUBSTITUTING THE INTERVENORS' INTEREST FOR THE ACTUAL INTEREST OF THE GOVERNMENTAL ACTORS MAKING USE OF THE SUSPECT CLASSIFICATION

This Court requires that strict scrutiny be applied to any governmental actor's use of racial classifications. *See Adarand v. Pena*, 515 U.S. 200 (1995). Strict scrutiny in turn requires a compelling governmental interest and narrow tailoring towards that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 507-508 (1989). There can be no doubt that governmental actors cannot look to third parties to justify or defend the governmental actions. Strict scrutiny requires that the governmental actor provide the compelling governmental interest. *Id* at 505. This Court has also stated that courts must be the "most skeptical" of the use of race by any governmental actor. *See Bush v. Vera*, 116 S.Ct. 1941, 1951-56 (1996). Racial classifications are simply too pernicious to permit anything but the "most exact connection between the justification and the classification". *Adarand*, 515 U.S. at 213, quoting Stevens, J. dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (emphasis supplied).

The extraordinary burden on governmental actors under strict scrutiny could never be assigned or abdicated to a non-governmental actor much less a ra-

cially exclusive private entity or its individual members. In effect, Respondent Intervenors intend to justify the governmental actors' use of race by retroactively suggesting in the year 2000 that the 1996 Exam might have been unfair and therefore the use of race could have been justified if the governmental actors had considered the Exam fairness at the time of the use of race against Petitioners. However, this Court has rejected the idea of retroactive justification for the use of race. In *Shaw v. Hunt*, 116 S.Ct. 1894 (1996)(Shaw II) the Appellees attempted to prove that their use of race could be justified based on two reports prepared for the litigation challenging the use of race. This Court found that the reports were not in existence at the time that racial classification was used and as such could not have been the basis of justifying the use of race retroactively.

> "Appellees, to support their claim that the plan was drawn to remedy past discrimination, rely on passages from two reports prepared for this litigation...Obviously these reports...were not before the General Assembly when it enacted the [law]. And there is little to suggest that the legislature considered the historical events and social science data that the reports recount..."

Shaw v. Hunt, 116 S.Ct. 1894, 1903 (1996).

This Court's *Shaw II* decision on the prohibition against retroactivity is strengthened when viewed in conjunction with *Adarand* when this Court held that there must be the "most exact connection between the justification and the classification." *Adarand*, 515 U.S. at 213, quoting Stevens, J. dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). This holding must

presume, based upon the "most exact connection" standard, that the governmental actors identified and fully understood why the classification was made at the time it was made. Any retroactive analysis to supply the justification for the classification, by definition, would not be the "most exact connection." This exact connection is a mandatory requirement in order for the governmental actor to achieve the second prong of strict scrutiny, i.e. narrow tailoring. The need to retroactively identify an interest means that narrow tailoring could never have been achieved, since it would be impossible for the governmental actor to narrowly tailor a use of race to rectify an allegedly unfair test since the test was not considered.

While the 9th and 10th Circuits have held that post-enactment evidence might be acceptable (*Coral Construction*, 941 F.2d at 920; *Concrete Works*, 36 F.3d at 1521), such holdings are directly in conflict with this Court's holdings in *Wygant*, *Croson*, and *Shaw II*. This conflict was analyzed extensively by the United States District Court in *West Tennessee Chap. of Assoc. Builders and Contractors, Inc. v. Bd. Of Educ. Of Memphis City Schools*, 64 F.Supp.2d 714, which said:

> "With all due respect to these various circuit courts that have addressed this issue, the court concludes that admitting post-enactment evidence to show a compelling interest is contrary to Supreme Court precedent, as developed in Wygant, Croson and Shaw. The court holds, therefore, that post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling...Because motive is an issue, it also

makes sense to require that the governmental entity establish a strong basis in evidence before acting, rather than allowing a lesser standard...where a governmental entity establishes a strong basis in evidence of the need for remedial action prior to enacting a racially-based program, the court can fairly infer that the actual purpose of the program is remedial. On the other hand, if a governmental body implements a racial preference plan with little or no evidence of the need for such a program, the court can only speculate on the government's motive. Such speculation is insufficient to survive strict scrutiny analysis. See Shaw, 517 U.S. at 908 n. 4, 116 S.Ct. 1894 ("[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature."). Additionally, allowing the use of post-enactment evidence may encourage a government with strong racial political motivations to enact race-based preferences without an adequate factual basis. If sued, the government can then marshal its resources and use the subpoena power of the courts to support its program. This prospect may create a chilling-effect that discourage non-minorities for protecting their rights. A non-minority contractor, for instance, might feel that its equal protection rights have been violated by an affirmative action plan adopted without proper evidence of its need. However, the contractor may hesitate to sue, knowing that if it does, the public defendant will conduct extensive additional research

> through the legal process in an attempt to support the plan. In essence, the plaintiff would be forced to attack a moving target of newly developing evidence to support past motivations, rather than to deal with the motivating factors that existed at the time of the government's action.

Western Tennessee, 64 F.Supp.2d 714,719-720. This language is exactly on point with the "moving target" technique being employed by the Defendants and the Respondent Interveners in the instant case to the detriment of the Plaintiffs. It is extremely important to note that in *Shaw II*, the governmental actor was suggesting that it could retroactively justify the use of race and the Court rejected that idea. Given the requirements of strict scrutiny, it would be absurd to believe that the Respondent Intervenors, a racially exclusive non-governmental entity or its individual members would be allowed such retroactive justification when the actual governmental actor was not permitted to use such justification.

This Court has already stated in *Bush v. Vera*, 116 S. Ct. 1941 (1996) that it must be at its most skeptical level in reviewing governmental use of racial classification. The need for that most skeptical level of review is emphasized in this case where collusion seems apparent between the governmental actors and the Respondent Intervenors. The collusion arises where the Respondent Intervenors challenge the fairness of the Exam and the governmental actors either collusively agree with the Respondent Intervenors or fail to defend their use of the Exam so as to then use the allegedly unfair exam as the compelling governmental interest necessary to justify the use of race

against the Petitioners. This collusion is required since the Defendant governmental actors have no other possibility of meeting the compelling governmental interest requirement of strict scrutiny. Despite the fact that the Defendant governmental actors assented to the Motion to Intervene where the purpose of the Motion challenged the governmental actors' use of the Exam, the First Circuit failed to be at its most skeptical and mistakenly gave the governmental actors the benefit of the doubt and assumed that the governmental actors would defend their own Exam as valid. In its decision the First Circuit states:

> "While the Boston Police Department is likely to adopt a first line of defense (Def's Answer, 9th Aff. Def,), there is ample reason for it to resist a defense premised on a showing that its tests are currently in violation of law." First Circuit's Decision, Appendix A, Page 10a.

This presumption is misplaced because the City of Boston's incentive is to avoid liability to the Petitioners and at the same time continue to use race in its promotion process. The City of Boston has realized that if it collusively agrees that it used an allegedly unfair Exam then it will allow the Respondent Intervenors to supply an interest intended to replace this Court's *Shaw II* requirement that the City supply its own compelling governmental interest. Even though the Intervenors are accusing the Defendants of using an unfair exam, the Defendants have nothing to fear from the Respondent Intervenors with respect to the alleged discrimination resulting from the allegedly unfair Exam. The Court should consider the fact that while the Respondent Intervenors have pointed to the

Exam as allegedly unfair, they have not sought a new exam. They have not sought invalidation of the Exam. They have not sought damages against the Defendants. This Court should be most skeptical of the Respondent Intervenors' failure to take such normal steps. The reason that they have failed to take such normal steps is clear. As long as Defendants can claim that the Exam is unfair, then they can use the Exam to justify a perpetual racial preference without changing the Exam. Certainly, in order for the Respondent Intervenors and Defendants to make such a claim, they would have to know of the alleged unfairness since 1996 and yet they have not even attempted to eliminate the alleged unfairness. The Respondent Intervenors had over 4 years to challenge the Exam and yet failed to do so. This fact buttresses the assertion that Respondent Intervenors simply intend to have the argument of possible Exam unfairness as a justification for perpetual use of a racial preference. Nothing has transpired since 1996 which would have suddenly rendered the 1996 Exam unfair. The only occurrence which triggered the Respondent Intervenors' assertion is the Petitioners' complaint. But if the 1996 Exam is unfair in the year 2000 then it would have been unfair in 1996.

Lest the Court consider this far fetched, it need only consider the City's recent tactics in *Wessmann v. Gittens* 160 F.3d 790 (1st Cir. 1998). In *Wessmann*, the City of Boston School Department actually alleged that its own teachers were discriminating against its own minority children in the Boston School System, and thus its own discrimination justified its use of racial preferences against the Caucasian plaintiff Sarah Wessmann. Despite making such a momentous allegation of civil rights violations against itself, the City

never sought indictments of its own teachers, never reported such discrimination to the U.S. Attorney, the Commonwealth of Massachusetts Attorney General, the District Attorney or the civil rights office of the Department of Justice. It is important to note that in *Wessmann*, the would be intervenor N.A.A.C.P., which was working "hand in glove" with the City, never sought indictments or filed any civil actions against those within the School Department who it alleged were discriminating against the minority students. No actions were taken against the alleged and unidentified teachers since the City and the N.A.A.C.P. knew that the claim was manufactured because it was the only way to meet the strict scrutiny requirement. This type of collusion not only makes a mockery of strict scrutiny but also denigrates Civil Rights Acts promulgated to protect against discrimination. Given the City's history in *Wessmann*, it is unrealistic to presume that the City Defendants will do anything other than cooperate with the Respondent Intervenors. The Court should not assume any good faith on the part of the City Defendants to defend the Exam. Rather the Court should be at its most skeptical level of review since by definition strict scrutiny requires nothing less. (*See Bush v. Vera*, 116 S. Ct. 1941, 1951-56 (1996).

This Court has identified that the use of race is the most pernicious classification by a government of its citizens. The Defendants' and the Respondent Intervenors' collusion magnifies the perniciousness of the classification by attempting to use the imprimatur of the federal courts through intervention as a way to somehow avoid strict scrutiny. Given the social disruptiveness of racial classifications justifications of such pernicious classifications which result from col-

lusion and post hoc alliances emphasizes the need for adherence to this Court's already established rules on strict scrutiny.

II. THIS COURT SHOULD ADDRESS THE ARTICLE III STANDING/RULE 24 INTERVENTION QUESTION LEFT UNANSWERED BY THIS COURT IN *DIAMOND V. CHARLES*

This case, perhaps for the first time, presents the problems faced by this Court in *Diamond v. Charles*, 476 U.S. 54 (1986) within the context of strict scrutiny. Analyzing Article III standing (for the purpose of enlargement of the issues) and Fed. R. Civ. P. 24 independently of strict scrutiny is impossible. However, if strict scrutiny could be removed from the analysis, it is still clear that the Respondent Intervenors have not met Article III standing nor the requirements of Rule 24 and, therefore, the intervention should not be allowed.

In *Diamond* this Court left unanswered the question of whether an intervenor needs to demonstrate Article III standing in order to intervene.

> "...the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III."

Diamond, 476 U.S. at 69. This Court noted that a conflict among the Circuits already existed at the time

of the *Diamond* decision. The First Circuit obviously flagged their concern about the lack of precedent by this Court and the obvious conflict in the various Circuit Courts of Appeal concerning the right of intervenors to enlarge the issues.

> "The traditional sense was that a court could not impose conditions on an intervention as of right. 7C Wright, Miller & Kane, Federal Practice and Procedure § 1922, at 505 (2d ed. 1986). However, the 1966 Amendment to Federal Rule of Civil Procedure 24(a) may have changed this rule. Id.; see also Fed. R. Civ. P. 24(a) advisory committee's note. District Courts have frequently imposed such conditions, and courts of appeals have sometimes embraced them, Beauregard, Inc. v. Sword Servs. LLC, 107 F.3d 351, 352-353 (5th Cir. 1997); Southern v. Plumb Tools, 696 F.2d 1321, 1322 (11th Cir. 1983), but courts of appeals have commonly reserved the issue, leaving the extent to which such conditions may be imposed unclear, e.g., Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469-70 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993). See Wright, Miller & Kane, supra, §1922 (2d ed. 1986 & Supp. 2000)." First Circuit's Decision, Appendix A, Page 10a, FN 2.

The First Circuit's decision emphasizes the need for a resolution to this and the *Diamond* question when it described the Article III standing issue as "immensely complicated" and described enlargement of issues as "fraught with difficulties" and further stated that the Court found no precedent "in any 1st Circuit cases

that address the precise issue before [it]." First Circuit's Decision, Appendix A, Page 10a.[1]

Despite the fact that the Petitioners' appellate brief extensively discussed the problems inherent in deciding an Article III/Rule 24 issue within the context of strict scrutiny, the First Circuit's decision never discusses how the requirements of strict scrutiny are impacted by its decision. The absence of any language in the decision concerning strict scrutiny does not mean, however, that the First Circuit did not consider it. Indeed, it is reasonable to conclude that the First Circuit's determination that the enlargement of the issues was "fraught with difficulties" must have been related to the problems identified by the Petitioners under the requirements of strict scrutiny since mere enlargement of issues, given the facts of the instant case, is not an inherently difficult issue because Rule 24 was never intended to be a method of avoiding Article III standing. Even if the Respondent Intervenors met the requirements of Rule 24 for the purposes of mere intervention they would necessarily have to meet the requirements of Article III to enlarge the issues beyond those raised by the plaintiffs and defendants especially where the Respondent Intervenors could not raise those issues on their own in a separate lawsuit. In fact, there can be no issue more "fraught with difficulties" than the complex logistical, evidentiary,

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[1] The Court stated that the intervention issue is "peculiarly difficult to answer...but the Supreme Court cases have expanded the notion without setting any firm limits...the doctrinal rules are so general as to provide very little help...and the diversity of facts and interests that may be affected by litigation today is so broad as to make any simple formula difficult if not impossible to contrive." First Circuit's Decision, Appendix A, Pages 6a-7a.

and burden of proof issues related to intervention and enlargement of the issues without Article III standing in a matter controlled by strict scrutiny. As a result, the First Circuit, either in an attempt to fundamentally change the requirements of strict scrutiny, or in an effort to side step the difficulties posed by their decision, never addressed the issue. While the facts of *Diamond* suggest that the Article III problem did not have to be resolved, the facts of the instant case demonstrates why Article III standing within the context of Rule 24 is an absolute requirement in order for the Respondent Intervenors to enlarge the issues beyond those raised by the Petitioners. The First Circuit apparently accepted the premise that the Respondent Intervenors could intervene to enlarge issues beyond the Petitioners' original claims because the Exam had nothing to do with the complaint and most certainly the "current" exam is not related to the promotion of the 3 African American officers in any way. Notwithstanding that acknowledgment, the Court, inexplicably, goes on to state that the Court would not decide whether it would allow enlargement of the issues even though the basis of its decision was that intervention would be allowed because of enlargement of the issues.

> "A closely related and more difficult issue, not discussed by the parties, is the extent to which an intervenor defendant can enlarge the issues in the case beyond those that the original Plaintiff and Defendant wish to litigate. This is a matter fraught with difficulty and we decline to take a position on it in the abstract without the benefit of briefing." First

> Circuit's Decision, Appendix A, Page 10a. (emphasis added)[2]

The First Circuit has, in effect, rendered Article III standing a nullity by allowing the Respondent Intervenors to intervene based upon their intention to possibly enlarge the issues in the Petitioners' lawsuit where the Petitioners are claiming damages unrelated to the Exam. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), this Court set forth a three-part test for organizational standing when standing is based on injury to the organization's members:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* at 343.

The Respondent Intervenors do not have standing to sue in their own right to challenge the validity of the Exam since the two individual intervenors were promoted as a result of the discrimination against the Petitioners and any other individuals that would like to challenge the validity of Exam have no claim based upon the running of the statute of limitations. There-

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[2] The First Circuit ignored the fact that the Petitioners repeatedly raised "enlargement of the issues", no less than sixteen times in the Petitioners brief, including Petitioners' Statement of Issues #3, #6, #7, and #9 and in extensive discussions concerning the impact of allowing Intervenors to enlarge issues.

fore, the first prong of the *Hunt* test cannot be met. The Respondent Intervenors claim that their interest is to advocate in favor of race conscious hiring. See Appellant's' Brief, Appendix B, Pages 27a - 28a. Simply advocating for race conscious hiring in the absence of a compelling governmental interest could never be a sufficient interest to be protected within the context of *Hunt*. For whatever reason, the First Circuit mistakenly held that it was part of the organizational Respondent Intervenors function to represent the interests of its members in supporting race conscious hiring and that, in and of itself, grants Article III standing and Rule 24 intervention.

> "[We assume here] that it is part of MAMLEO's function to represent the relevant members' interests in matters of this kind and that the members' own participation is not essential, then MAMLEO too has the necessary stake in the outcome and a good chance of showing that absent intervention, disposition of the case 'may as a practical matter impair or impede' the protection of that interest." [First Circuit Decision Page 11]...Interestingly, the test described above originated as a three-part test for 'standing' of organizations, Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 341-43 (1997), but has since been used interchangeably as a test for both organizational standing and for the organization's right to intervene. E.g., Sierra Club, 82 F.3d at 110; Equal Opportunity Employment Comm'n v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986)." First Circuit's Decision, Appendix A, Page 11a.

The above language not only confuses mere advocacy for race conscious hiring with Article III standing, it also confuses Rule 24 requirements with Article III standing in a way that simply renders Article III standing a nullity. In effect, the First Circuit apparently held that the Article III requirements of *Hunt* and the Rule 24 requirements could be mixed and matched so that if an intervenor met any one of the requirements of *Hunt* or Rule 24 then, in effect, the Respondent Intervenors met the requirements of both.

Finally, the third prong of *Hunt* anticipates that individual members' participation in the litigation cannot be essential if the organization is to be allowed to intervene. Nevertheless, the First Circuit has found that the Respondent Intervenors Organization and its individual members can both intervene because the individual members' participation is essential. This confusion is in part explained by Footnote 3 which indicates that the First Circuit mistakenly relies on cases that interchange the Article III standing issues outlined by *Hunt* with the specific requirements of Rule 24.

In *International Union v. Brock*, 477 U.S. 274, 287 (1986), this Court found the third prong satisfied because the suit raised a "pure question of law" and neither the claims asserted nor the equitable relief sought required the District Court to consider the individual circumstances of an aggrieved organization member. The First Circuit, however, in violation of the *International Union* holding, did specifically consider the individual circumstances of the individual intervenor members of the organization.

> "Here the question of whether the two applicant sergeants claim 'interests relating to the

> property or transaction which is the subject of the action seems to us relatively easy to answer. In substance, the complaint charges the validity of their promotions: it says they were impermissibly preferred in advancement and the plaintiffs excluded, on racial grounds. This amounts to saying that their promotions were based on an unconstitutional decision or process, and to say that an officer has no interest in defending his own promotion would be to defy common sense." First Circuit's Decision, Appendix A, Page 7a.

This language makes clear that the First Circuit impermissibly did consider the individual circumstances of the organizational members and, in fact, simultaneously allowed intervention of those individual members and their organization, in contravention of this Court's holdings in *Hunt* and *International Union*. As if this were not enough, the First Circuit in referring to Rule 24 again asserted that intervention would be allowed because even a small threat to the intervenors' promotion would be sufficient reason for finding that individually they had to protect their interests.

> "A case can exist in which a party may have interests in the property or transaction but might not be so situated that the interests could not be affected by the outcome; but here for reasons already indicated even a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for a finding that their ability to protect their interests may be

adversely affected." First Circuit's Decision, Appendix A, Page 8a.

It is worth considering here what the standard for intervention would be if the Petitioners had actually sought the removal of the Minority Officers (which the Petitioners did not). The First Circuit presumes that the Minority Officers hired as a result of the use of race would have to intervene to be able to defend their promotions. This presumption at first blush seems logical, however, the individual Respondent Intervenors justifications would be irrelevant because their justifications were not considered by the Defendants at the time race was used by the Defendants. The First Circuit is not only inconsistent with the *Hunt* decision, it also again unwittingly changes the requirements of strict scrutiny. The First Circuit apparently is allowing individual beneficiaries of the governmental actor's use of race to defend that the governmental actors' use of race in the exact same way that the Respondent Intervenor organization intends to defend that use, i.e. to possibly challenge the Exam. In effect, the individual intervenors would be retroactively supplying compelling governmental interests that were not considered by the governmental actor at the time that race was used against the Petitioners.

However, assuming arguendo that the First Circuit was correct in holding that the two individual intervenors should be allowed to intervene in order to defend their promotions, (which Petitioners strongly disagree with) that results in the Respondent Intervenor organization only being able to challenge the Exam given in 1996 and the statute of limitations has passed on such a claim. More importantly, using the

First Circuit's logic, if the promoted 2 minority officers can intervene to defend their promotions by challenging the Exam then every promoted non-minority officer would have to be allowed to intervene to defend their promotions by defending the Exam, particularly where the adequacy of representation by the Defendants defending the Exam is certainly suspect given the Defendants' assention to the intervention.

It is important to note that the Petitioners did not seek to have the minority officers demoted. Nevertheless the First Circuit, in attempting to justify the minority officers' intervention, stated:

> "Admittedly, the Plaintiffs have not asked that the promotions be voided and the contest begun again; instead the plaintiffs would naturally prefer promotion for themselves with back pay. But the plaintiffs do not make the final decision as to what relief should be afforded if the District Court does find a constitutional violation. There are cases enough where, in the employment context, courts have undone hiring or promotion decisions tainted by wrongful motives or practices. E.G., Jones v. Rivers, 732 F.Supp. 176, 179 (D.D.C. 1990)." First Circuit's Decision, Appendix A, Page 7a.

Similarly, the Respondent Intervenors have not argued for the voiding of the promotions of all white officers promoted as a result of the Exam. However, based upon the First Circuit's logic, one could argue that every white officer promoted in the Exam could also have their promotions undone if the Respondent

Intervenors could convince the Court that the Exam was unfair.[3]

This example demonstrates how the First Circuit's divergence from strict scrutiny opens the flood gates to absurdly complex ramifications by allowing intervention of third parties to possibly challenge an Exam that is not the subject of the underlying lawsuit nor relevant to the governmental actors' use of race against the Petitioners. Such assertion that intervention is necessary to possibly challenge the Exam is so speculative so as to fall far short of any reasonable standard for intervention or strict scrutiny. If the governmental actors are unwilling, or unable, to demonstrate a compelling governmental interest and narrow tailoring thereof, then the Defendants will fail to meet the requirements of strict scrutiny. The simplicity of strict scrutiny is intentional.

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[3] It is worth noting that the First Circuit states that "there is ample reason for it [City] to resist a defense premised on a showing that its tests are currently in violation of law." (emphasis supplied). First Circuit's Decision, Appendix A, Page 10a. This statement suggests that multiple exams (plural) are to be challenged. It also suggests that the current exam may be challenged. However, the Petitioners did not and are not challenging the current exam, and whether the current exam is in violation of law is irrelevant to the Petitioners' claims. This language suggests confusion of the very issue that appears to be the First Circuit's justification of the intervention and also suggests that every white officer that has been promoted as a result of current exams might also intervene to defend their promotions by defending current exams. Thus, the First Circuit's Decision not only apparently allows for standing to challenge the 1996 Exam, it also apparently allows for the enlargement of issues to the current "exams" which are completely unrelated to the Petitioners' claims.

The complexity that arises from the First Circuit's decision is unsettling, contrived and fraught with difficulties. This is hardly the interpretation that this Court intended when it created this highest level of judicial review.

III. THE RESPONDENT INTERVENORS LACK ANY DIRECT OR SUBSTANTIAL CONNECTION TO THE LITIGATION.

The First Circuit holding allows any racially exclusive group to claim a direct or substantial interest in litigation under Rule 24 simply because they are beneficiaries of a use of race by a governmental actor even though the use of race is not part of a court order, affirmative action policy, or consent decree. This holding so expands the problems facing any plaintiff as to render the prospect of challenging the use of race even more daunting than it already is. Any time a governmental actor illegally discriminates against any citizen, the beneficiaries of that discrimination could intervene and materially affect the conduct of the litigation to the detriment of the victim of the discrimination by simply suggesting there could be a justification for the discrimination. In order for the Respondent Intervenors to have an interest they would have to allege that their promotions resulted in discrimination against them. Intervention of the individual intervenors as defendants should never be allowed unless the individual intervenors are suggesting that they were co-conspirators in the exclusion of the Petitioners from the promotion process in which case it is inconceivable that they would be seeking to intervene at all.

It is very likely that the complications resulting from all of the above only "scratch the surface" of evidentiary and logistical problems that intervention

without an interest or Article III standing would cause. Certainly, the effects of the First Circuit's decision are being felt by the Petitioners. Due to the First Circuit's decision, the District Court has materially altered the entire schedule of the litigation. The Intervenors have commenced discovery on the validity of the Exam, and have in effect changed the nature of the litigation from a straight-forward claim of the Petitioners, to a "fishing expedition" intended to obstruct the Petitioners claims on unrelated Exam analysis.

The prospect of individual citizens challenging governmental actors is daunting to say the least. The ramifications of the First Circuit's decision clearly result in affording the governmental actors even more power. Any retroactive alliance between the governmental actors with the beneficiaries of illegal governmental race discrimination could overwhelm individual citizens' access to the judicial system by, in effect, so complicating discovery and burden of proof and hopelessly confusing the nature of governmental action made under the "color of law." No plaintiff would be able to ascertain the justification or legality of any governmental use of race until after the governmental actor entered into ex post facto alliances with the beneficiaries of the use of race to establish retroactively how to defend the governmental actor's use of race. In addition, the financial burden on any similarly situated plaintiff to hired experts to analyze and defend an Exam which the Plaintiff is not challenging, materially interferes with the Plaintiffs' access to the judicial system.

CONCLUSION

The First Circuit unwittingly identified the morass of complications that result from this type of unprece-

dented intervention when it stated that it was "fraught with difficulties." Unfortunately, it is the First Circuit's decision that gives life to such difficulties and materially interferes with the Petitioners' rights in bringing their claims before the court. The First Circuit shifts the extraordinary governmental burdens established by this Court onto the Petitioners. Such shifting of this extraordinary burden eviscerates the highest and most skeptical level of judicial review established by strict scrutiny. The First Circuit's decision is a dangerous precedent affecting not only Article III standing and Rule 24 intervention but also a potentially devastating blow to the rights of individual citizens seeking to protect themselves from the most pernicious of classifications that can be made by any governmental actor. If allowed to stand, the First Circuit's decision will undoubtedly encourage other governmental actors to similarly attempt to circumvent the requirements of strict scrutiny and, therefore, the First circuit's decision must be reversed. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Winifred N. Cotter, Vincent J. Difazio, John P. Doris, William J. Dwan, William G. Knecht, Michael Locke, Patrick L. Murphy and Thomas L. Sexton.

By their attorney,

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Date: October 9, 2000

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 00-1056

WINIFRED N. COTTER, ET AL.,
Plaintiffs, Appellees,

v.

MASSACHUSETTS ASSOCIATION OF
MINORITY LAW ENFORCEMENT OFFICERS,
DENNIS A. WHITE and HAROLD WHITE,
Proposed Intervenors, Appellants.

CITY OF BOSTON, JAMES J. HARTNETT, JR.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before
Boudin, Stahl and Lipez,
Circuit Judges.

Rheba Rutkowski with whom Jonathan M. Albano, Bingham Dana LLP, and Grace M. Jones, Lawyers Committee for Civil Rights Under Law of the Boston Bar Association, were on brief for proposed intervenors, appellants.

Michael C. McLaughlin with whom Law Offices of Michael C. McLaughlin was on brief for plaintiffs, appellees.

July 17, 2000

BOUDIN, Circuit Judge. On May 21, 1999, Winifred Cotter and seven other white officers of the Boston Police Department brought an action under section 1983, 42 U.S.C. § 1983, alleging that plaintiffs' constitutional rights to equal protection were violated by the promotion to sergeant of three black officers of the Boston Police Department. The plaintiffs and the three promoted officers all scored 84 on a promotional exam administered in October 1996. The complaint alleged that the three minority officers were promoted to sergeant for the purpose of maintaining or increasing minority representation among sergeants and that the eight plaintiffs were excluded from promotion because they were white.

The complaint cited various police department documents that plaintiffs say evidence a preoccupation with race in the decision to promote the three minority officers and not the plaintiffs, but defendants' answer disputes the inferences to be drawn. The relief sought in the complaint is an order of the court requiring that the plaintiffs be

promoted to the sergeant position, retroactive to December 12, 1997, that plaintiffs be awarded damages, including but not limited to wages and benefits that would have been earned if promotion had occurred in a timely manner, and that plaintiffs be awarded attorney's fees.

At this stage the merits are not before us. Rather, the only issue presented on this appeal is whether the minority officers who were promoted are entitled to intervene as of right and whether intervention as of right should also be allowed to the Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"). The chronology of the case and history of the intervention effort are as follows.

The complaint was amended on July 29, 1999, limiting the defendants to the City of Boston and James Hartnett, Jr., who heads a Commonwealth office involved in personnel matters. In August 1999, Hartnett moved for dismissal of the claims against him on the ground that he was not responsible for the promotion decision. When the district court denied the motion to dismiss in October 1999, Cotter v. City of Boston, 73 F. Supp. 2d 62 (D. Mass. 1999), Hartnett moved to certify to the Massachusetts Supreme Judicial Court questions of law concerning his authority. In this same period, two of the three black officers promoted to sergeant--Dennis White and Harold White--moved to intervene as of right as defendants in the case, as did MAMLEO.

The plaintiffs objected to the intervention, while the defendants acquiesced in it. In a two-sentence margin order entered on November 23, 1999, the

district court denied the intervention motion but gave MAMLEO the right to file amicus briefs. Shortly thereafter, the district court set a discovery deadline of September 30, 2000. On December 30, 1999, an appeal was filed to this court by the two sergeants and MAMLEO. We refused to grant a stay of proceedings in the district court but expedited this appeal.

The denial of intervention claimed as of right is immediately appealable, Flynn v. Hubbard, 782 F.2d 1084, 1086 (1st Cir. 1986), but plaintiffs object to our consideration of the appeal, arguing that none of the would-be intervenors can demonstrate Article III standing. The parties argue in their briefs about whether intervenor-defendants are required to show standing, an issue on which the Supreme Court has reserved judgment, Diamond v. Charles, 476 U.S. 54, 68-69 (1986). Fortunately, there is no need to grapple with this question here.

Under Article III, a critical ingredient for standing is that a party have a concrete stake in the outcome of a dispute that is otherwise fit for resolution by the courts. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Consonantly, absent a statutory basis for intervention, an applicant seeking to intervene as of right must show that

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the

> disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2) (emphasis added). Thus, in the ordinary case, an applicant who satisfies the "interest" requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well. See Transamerica Ins. Co. v. South, 125 F.3d 392, 396 n.4 (7th Cir. 1997).

Standing is an immensely complicated set of doctrines, Chemerinsky, Federal Jurisdiction § 2.3, at 56-57 (3d ed. 1999), and it may be that there are unusual cases where an intervenor could satisfy the interest requirement of Rule 24(a)(2) without having the stake in the controversy needed to satisfy Article III. Here, no peculiar circumstances of this kind are urged. Accordingly, we see no reason to concern ourselves with the abstract question whether an intervenor-defendant must show some separate form of standing. We therefore turn to the question whether the applicants do satisfy the various requirements for intervention as of right, prefacing this inquiry with a brief reference to the standard of review.

On appeal from the denial of intervention as of right, it is commonly said that review of the district court decision is for "abuse of discretion," but this may be a misleading phrase. Decisions

on abstract issues of law are always reviewed de novo; and the extent of deference on "law application" issues tends to vary with the circumstances, see Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 16 (1st Cir. 1996). In all events, Rule 24(a)(2)'s explicit standards "considerably restricts the [district] court's discretion." See International Paper Co. v. Inhabitants of the Town of Jay, Maine, 887 F.2d 338, 344 (1st Cir. 1989) (quoting Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring)).

The applicants for intervention cite to us authority from other circuits that where (as here) the district judge makes no findings and gives no reasons, review of denial of intervention should be de novo, League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997); Edwards v. City of Houston, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc). This court has not followed this approach, International Paper, 887 F.2d at 343-44, because in many situations, the district court's findings or reasons can be reasonably inferred. See United States v. Owens, 167 F.3d 739, 743 (1st Cir.), cert. denied, 120 S. Ct. 224 (1999). If they cannot be inferred, then there is nothing to which to give deference.

Turning to the merits, the central question whether what an applicant for intervention is claiming is "an interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), is peculiarly difficult to answer. The drafters may very well have had in mind a rather concrete common law interest,

such as an applicant's ownership claim to a piece of property in dispute between two other parties, but Supreme Court cases have expanded the notion without setting any very firm limits. Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104, 110 (1st Cir. 1999). The doctrinal "rules" are so general as to provide very little help, see 7C Wright, Miller & Kane, Federal Practice and Procedure § 1908 (2d ed. 1986 & Supp. 2000), and the diversity of facts and interests that may be affected by litigation today is so broad as to make any simple formula difficult, if not impossible, to contrive.

Here, the question whether the two applicant sergeants claim an "interest relating to the property or transaction which is the subject of the action" seems to us relatively easy to answer. In substance, the complaint challenges the validity of their promotions: it says that they were impermissibly preferred in advancement, and the plaintiffs excluded, on racial grounds. This amounts to saying that their promotions were based on an unconstitutional decision or process, and to say that an officer has no interest in defending his own promotion would be to defy common sense.

Admittedly, the plaintiffs have not asked that the promotions be voided and the contest begun again; instead, the plaintiffs would naturally prefer promotion for themselves with back pay. But the plaintiffs do not make the final decision as to what relief should be afforded if the district court does find a constitutional violation. There are cases enough where, in the employment context, courts have undone hiring or promotion decisions

tainted by wrongful motives or practices. E.g., Jones v. Rivers, 732 F. Supp. 176, 179 (D.D.C. 1990).

The second question posed by the intervention rule--whether the intervention applicants' ability to protect their interest "may" be "impair[ed] or impede[d]" if they are not allowed to intervene, Fed. R. Civ. P. 24(a)(2)--is also easily answered. A case can exist in which a party might have an interest in the property or transaction but might be so situated that the interest could not be affected by the outcome; but here, for reasons already indicated, even a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for finding that their ability to protect their interest "may" be adversely affected.[1]

Ordinarily, the most difficult issue in cases of this kind is the third requirement, namely, that the applicant's interest will not be "adequately represented by existing parties." Where the applicant seeks to intervene as a defendant and the existing defendant is a governmental entity, this court and a number of others start with a rebuttable presumption that the government will defend adequately its action, e.g., Daggett, 172 F.3d at 111. This is so even if the governmental defendant itself consents to intervention, Public Serv. Co. v. Patch, 136 F.3d 197, 208 (1st Cir. 1998);

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[1] Grutter v. Bollinger, 188 F.3d 394, 399 (6th Cir. 1999); Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., 60 F.3d 1304, 1307-08 (8th Cir. 1995); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984).

there are other interests at stake, including the court's own concern in efficiently managing litigation.

The applicants for intervention urge that the presumption should not extend to cases in which the government is defending in a proprietary capacity. In support of this proposition, they cite statements by courts of appeals of two other circuits, Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996), and Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996). However, in a situation such as the present one, in which the government is being sued, the presumption rests primarily on the premise that the government as an institution is likely to do an adequate job of defending its own conduct. See Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n, 197 F.3d 560, 566-67 (1st Cir. 1999), cert. denied, 120 S. Ct. 1846 (2000). This may be equally true whether one categorizes the government as acting in a sovereign or in a proprietary capacity--a line itself not always easy to draw, as this case itself suggests. In our view, it is enough to say that the nature of the government's interest is simply a possible factor in deciding whether the applicant's interest would be adequately represented by the government agency.

In this case, enough likelihood of conflict or divergence of interest exists to defeat any claim that "the applicant's interest is adequately represented by existing parties," Fed. R. Civ. P. 24(a)(2). The applicants for intervention have expressed an intention to defend the use of racial criteria, assuming that they were used, as a proper remedial

measure, both as a remedy for the past discrimination by the Boston Police Department and as a counter to the alleged deficiencies in its current tests. While the Boston Police Department is likely to adopt the first line of defense (Def.'s Answer, 9th Aff. Def.), there is ample reason for it to resist a defense premised on a showing that its tests are currently in violation of law.

A closely related and more difficult issue, not discussed by the parties, is the extent to which an intervenor-defendant can enlarge the issues in the case beyond those that the original plaintiff and defendant wish to litigate. This is a matter fraught with difficulty,[2] and we decline to take a position on it in the abstract and without the benefit of briefing. However, the intervention issue must be decided now; and there is enough likelihood of conflict or divergence between the intervention applicants and the named defendants to

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[2] The traditional sense was that a court could not impose conditions on an intervention as of right. 7C Wright, Miller & Kane, Federal Practice and Procedure § 1922, at 505 (2d ed. 1986). However, the 1966 Amendment to Federal Rule of Civil Procedure 24(a) may have changed this rule. Id.; see also Fed. R. Civ. P. 24(a) advisory committee's note. District courts have frequently imposed such conditions, and courts of appeals have sometimes embraced them, Beauregard, Inc. v. Sword Servs. LLC, 107 F.3d 351, 352-53 (5th Cir. 1997); Southern v. Plumb Tools, 696 F.2d 1321, 1322 (11th Cir. 1983), but courts of appeals have commonly reserved the issue, leaving the extent to which such conditions may be imposed unclear, e.g., Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469-70 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993). See Wright, Miller & Kane, supra, § 1922 (2d ed. 1986 & Supp. 2000).

overcome the final adequate-representation proviso.

The more difficult and far-reaching question on this appeal is whether MAMLEO is entitled to intervene as of right. It does not in this instance claim that its "property or transaction" is involved, and its claims must therefore be tested, under well-settled precedent, by asking whether its members have the kind of stake necessary for intervention individually. See, e.g., Sierra Club v. Glickman, 82 F.3d 106, 108-09 (5th Cir. 1996). If so, and assuming (as we do here) that it is part of MAMLEO's function to represent the relevant members' interests in matters of this kind and that the members' own participation is not essential, then MAMLEO too has the necessary stake in the outcome and a good chance of showing that absent intervention, disposition of the case "may as a practical matter impair or impede" the protection of that interest.[3]

MAMLEO stresses at the outset its long and distinguished history of representing officers of the Boston Police Department, including its role as a class representative in procuring a consent decree in 1980 that included affirmative action

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[3] Interestingly, the test described above originated as a three-part test for the "standing" of organizations, Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 341-43 (1977), but has since been used interchangeably as a test both for organizational standing and for an organization's right to intervene. E.g., Sierra Club, 82 F.3d at 110; Equal Employment Opportunity Comm'n v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986).

goals and timetables for promotion to sergeant.[4] These credentials indicate that MAMLEO's participation would be useful and well-informed, as the district court recognized in granting MAMLEO amicus status, but a historical connection by itself is not the same thing as "an interest [of MAMLEO's members] relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2). And while in some cases courts have allowed MAMLEO to intervene, we cannot find any direct discussion in our own cases that addresses the precise issue now before us.

The issue turns, it seems to us, on whether MAMLEO members who were not involved in this particular "promotion to sergeant" sequence still have enough of a stake in the outcome of this case to satisfy the "interest" provision of the intervention rule. Civil rights litigation involving race, and especially cases involving employment, do not always neatly fit the model of a discrete common law action between a plaintiff and a defendant. Rather, although the case may be sparked by a particular episode, the decision may

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[4] See Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, Civ. No. 78-529-McN (D. Mass. Sept. 16, 1980) (consent decree); see also Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 973 F.2d 18 (1st Cir. 1992); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1st Cir. 1985), cert. denied, 478 U.S. 1020 (1986); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 106 F.R.D. 80 (D. Mass. 1985).

be likely to control an ongoing process within the department or agency for formulating rules for advancement and so predictably affect the interests of others who are already employed by the same institution and who will in turn be seeking advancement.

Assuredly, a number of MAMLEO's current officer members are going to seek promotion to sergeant. Judged in the most practical terms, the outcome of this case may very well determine how the Boston Police Department handles, and is allowed to handle, comparable situations almost certain to arise in the future, and the likely impact on other MAMLEO members seems to us substantial, predictable and far more concrete than some general interest in precedent. Obviously, we are concerned here with matters of degree and a particular fact pattern; but the ultimate issue is pinning a legal label on those facts. On the admitted or obvious facts, MAMLEO seems to us to have enough to satisfy the "interest" requirement of the intervention rule.

Our prior discussion shows that MAMLEO also satisfies the other two requirements of Rule 24(a)(2). If plaintiffs prevail and as a result the Boston Police Department is constrained to ignore race entirely in all future promotions, other MAMLEO members may well lose promotion opportunities. Similarly, the potential conflict between MAMLEO and the Boston Police Department on how best to defend the consideration of race in promotions is enough to show that the interest of MAMLEO members is not "adequately

represented by existing parties," Fed. R. Civ. P. 24(a)(2).[5]

The order denying intervention is vacated and the matter is remanded to the district court with directions to allow intervention as of right to the three applicants. Each side will bear its own costs on this appeal. The plaintiffs' motion for damages, costs and attorney's fees is denied.

It is so ordered.

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[5] This does not mean that any other MAMLEO member is entitled to intervene as of right. If MAMLEO intervenes, it is hard to see how such an officer, whose own promotion is not immediately at stake, could avoid the "adequately represented" bar.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 00-1056

WINIFRED N. COTTER, ET AL.,
Plaintiffs-Appellees,

v.

MASSACHUSETTS ASSOCIATION OF
MINORITY LAW ENFORCEMENT OFFICERS,
DENNIS A. WHITE, AND HAROLD WHITE
Appellants-Proposed Intervenors

CITY OF BOSTON,
JAMES J. HARTNETT, JR.,
Defendants-Appellees.

On Appeal From An Order Of The United States
District Court For The District Of Massachusetts
Denying A Motion to Intervene

BRIEF OF APPELLANTS-PROPOSED INTERVENORS MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE, AND HAROLD WHITE

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Rule 21.6 Corporate Disclosure Statement

The Massachusetts Association of Minority Law Enforcement Officers is a corporation that has no parent corporation and is not owned in whole or in part by any publicly held company.

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I. JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(3) and 1343(4) because plaintiffs' claims arise under the Constitution and laws of the United States and because plaintiffs seek injunctive relief and damages for the alleged deprivation under color of state law of civil rights secured under the Constitution and Acts of Congress.

Appellate jurisdiction exists because the appeal is from the denial of the appellants' motion to intervene. Daggett v. Commission on Governmental Ethics and Election Practices, 172 F.3d 104, 109 (1st Cir. 1999).

The district court's denial of the appellants' motion to intervene was entered on the docket on November 30, 1999. Appellants timely filed their notice of appeal on December 30, 1999.

II. STATEMENT OF THE ISSUE

Whether, in a civil rights suit alleging that the Boston Police Department and the Commonwealth of Massachusetts unconstitutionally considered race in making promotions, the district court erred by denying a motion to intervene brought by two minority police officers, whom plaintiffs allege were promoted "solely because of their race," and by a minority organization that for over twenty years has represented the interests of minority candidates for promotion within the police department, including by challenging the validity of current promotional practices and

by advocating for race-conscious remedial efforts on behalf of its members.

III. STATEMENT OF THE CASE

This is an appeal from the denial of a motion to intervene filed by the Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"), and Boston Police Department Sergeants Dennis A. White and Harold White (collectively, "MAMLEO" or the "MAMLEO applicants").

[2]Plaintiffs, eight officers employed by the Boston Police Department ("BPD"), commenced this action on May 21, 1999, alleging that their constitutional rights were violated by the promotion to sergeant of three minority officers of the BPD (including two of the individual applicants for intervention). App. at 1 (Complaint).[1] Like the minority officers whose promotions they challenge, plaintiffs each scored 84 on a BPD promotional examination administered in October 1996 ("1996 Exam"). App. at 52 (Am. Complaint, ¶ 24). The complaint, as amended, alleges that plaintiffs' constitutional rights were violated when the three minority officers were promoted to sergeant ahead of them, and seeks both damages and injunctive relief. App. at 48, *et seq.* (Am. Complaint).

The initial complaint named as defendants the BPD; Paul F. Evans, the Commissioner of the BPD; Edward P. Callahan, Director of Human Re-

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[1] Materials contained in the Joint Appendix are cited to as "App.," followed by the page number(s), followed by a description of the particular document cited.

sources for the BPD; and the Commonwealth of Massachusetts, Executive Office for Administration and Finance, Human Resources Division (the "HRD"). App. at 1 (Complaint). On July 29, 1999, plaintiffs amended their complaint to name only two defendants, the City of Boston and James J. Hartnett, Jr., in his official capacity as the Personnel Administrator of the HRD ("Hartnett"). App. at 48 (Am. Complaint).

On August 3, 1999, Hartnett moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss plaintiffs' claims against him, on the ground that he neither made the promotions at issue nor has the authority under state law to prevent selections among equally scoring candidates. App. at 80 (Mot. to Dismiss). On October 20, **[3]**1999, the district court (Young, J.) issued a Memorandum and Order denying Hartnett's motion to dismiss. Cotter v. City of Boston, 73 F. Supp.2d 62 (D. Mass. 1999). See App. at 82 (slip op.).

On November 9, 1999, MAMLEO and Sgts. Dennis White and Harold White filed a motion to intervene as defendants, to which the existing defendants assented. App. at 94 (Mot. to Intervene). On November 22, 1999, plaintiffs filed their opposition to the motion to intervene. App. at viii (Docket). On November 23, 1999, the district court denied the intervention motion but ordered that: "MAMLEO shall, however, be included on the service list for all pleadings in this litigation and shall have the right to file amicus briefs at every stage. The Court will decide as necessary whether to afford MAMLEO an opportunity to be heard orally." App. at 114 (Margin Order). No

findings were made in support of the order; nor was there any oral argument or evidentiary hearing conducted on the matter.

On December 8, 1999, Hartnett moved to certify two questions of law to the Supreme Judicial Court for the Commonwealth of Massachusetts pursuant to SJC Rule 1:03. App. at 115 (Mot. to Certify). The questions concern the obligations and authority of the Personnel Administrator under state law when an appointing authority hires or promotes one among several equally scoring candidates on a certified civil service eligibility list. Id. Plaintiffs opposed the certification motion on December 15, 1999. App. at ix-x (Docket). As of the date this brief was filed, the motion remains pending before the district court.

On or about December 6, 1999, the parties moved for approval of a Joint Statement pursuant to Local Rule 16.1(D). App. at ix (Docket). On December 10, 1999, the district court entered an order approving the joint statement and setting a discovery deadline of September 30, 2000, and a dispositive motion deadline of November 15, 2000. App. at 122 (Notice of Action).

[4]On December 30, 1999, MAMLEO filed with the district court a motion to stay the proceedings below, pending MAMLEO's appeal of the denial of the intervention motion. App. at 129 (Mot. to Stay). The defendant City of Boston assented to the motion to stay; Hartnett took no position on the motion. Although plaintiffs advised MAMLEO that they would oppose the motion to stay, the district court denied the motion on January 5,

2000, prior to the filing deadline for plaintiffs' opposition papers. App. at 131 (Notice of Action).

On January 14, 2000, MAMLEO filed with this Court a motion to stay pending appeal. Plaintiffs filed their opposition on January 26, 2000. On February 8, 2000, this Court denied MAMLEO's motion to stay, but established an expedited briefing schedule on appeal.

IV. STATEMENT OF FACTS

A. MAMLEO's History Of Representing Minority BPD Officers

For the past 20 years, MAMLEO has played a crucial role in the integration of the BPD. MAMLEO was the class representative of "[a]ll present and future black sworn officers in the [BPD]," pursuant to a consent decree entered in 1980 in the case of Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, Civ. No. 78-529-McN ("Consent Decree"). Various provisions of the Consent Decree, including affirmative action goals and timetables for promotions to sergeant, were affirmed by this Court on three separate occasions.[2]

[5]As the representative of minority BPD officers, MAMLEO has been allowed to intervene in cases challenging the use of affirmative action pursuant to the Consent Decree, as well as in

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[2] Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't., 973 F.2d 18 (1st Cir. 1992); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't., 780 F.2d 5 (1st Cir. 1985).

cases involving the use of affirmative action outside of the context of the Consent Decree.[3]

Most recently, in Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998) ("Superior Officers I"), this Court held that the BPD's consideration of race as a factor in promoting a MAMLEO member to lieutenant survived strict scrutiny even though the promotion was not mandated by the Consent Decree. Among other things, the Court found that (i) "the BPD's historic discrimination negatively affected the number of black lieutenants at the time of [the challenged] promotion"; (ii) "the BPD's past racial discrimination has manifest effects in the present status of black officers"; and (iii) "[t]he effect of prior discrimination was compounded by the fact that experience makes up twenty percent of the score assigned to a candidate for promotion - a fact that, according to both Defendants' expert and the BPD's personnel director, negatively impacts black (who were on average less experienced) candidates." 147 F.3d at 20-21.

Reviewing the BPD's basis for engaging in affirmative action, the Superior Officers I Court stated:

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[3] See Stuart, 951 F.2d 446 (challenge to promotions pursuant to Decree); Boston Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998) (affirmative action not mandated by Decree); Boston Police Superior Officers Fed'n v. City of Boston, Civ. No. 98-10800-GAO (same); Boston Police Dep't. v. Abban, Suffolk Superior Court No. 99-0223-A (civil service challenge to affirmative action promotions).

> **[6]**Given the BPD's halting and, at times, quite modest progress in remedying its earlier discrimination, we are reluctant to infer that the vestiges of that discrimination had substantially disappeared when the BPD promoted Ruiz. The evidence warranted the district court's conclusion that the 1996 "statistical disparity combines with judicial findings of past entry-level discrimination by the BPD to imply convincingly that historical discrimination has affected the promotion of minority sergeants to the rank of lieutenant, and that the lingering effects of that discrimination were present in 1995 when the BPD promoted Ruiz."

147 F.3d at 23. See also Boston Police Superior Officers Fed'n v. City of Boston, Civ. No. 98-10800-GAO ("Superior Officers II") (allowing MAMLEO to intervene in pending case challenging continued use of affirmative action by BPD after Superior Officers I decision); Boston Police Dep't v. Abban, Suffolk Superior Court No. 99-0223-A (allowing MAMLEO to intervene in civil service challenge to use of affirmative action by BPD).

B. The Promotions At Issue

On October 19, 1996, the HRD and the BPD administered a promotional exam for the position of sergeant. App. at 51 (Am. Complaint, ¶ 18). On or about October 17, 1997, the HRD certified to the BPD a list of 69 candidates who had

achieved the highest scores on the exam. App. at 51 (Am. Complaint, ¶ 21).

On December 26, 1997, the BPD wrote to HRD stating its intent to promote three black officers who scored 84 on the exam ahead of six white officers with scores of 85. App. at 52 (Am. Complaint, ¶ 26). Cf. Superior Officers I, 147 F.3d at 24 (noting HRD's determination that, with respect to 1992 promotional exams, candidates who scored within three points of one another were "equally qualified"). The BPD stated that it was promoting the three black officers in order to ensure "compliance with current EEOC guidelines and applicable federal and state anti-discrimination laws." App. at 52, 70 (Am. Complaint, ¶ 26 and Exhibit B thereto). See Superior Officers I, 147 F.3d at 21 (affirming BPD's determination **[7]**that promotions in strict rank order would have supported inference of discriminatory impact under EEOC Guidelines). On January 15, 1998, the BPD advised HRD of the effect that promotions made in strict rank order, without regard to race, would have on the racial composition of the sergeant workforce. App. at 52, 72 (Am. Complaint, ¶ 28 and Exhibit C thereto).

On February 2, 1998, the HRD advised the BPD that it did not accept the proffered justification for promoting three black officers with scores of 84 ahead of six white officers with scores of 85. App. at 53 (Am. Complaint, ¶ 29). Faced with the HRD's position, the BPD in effect capitulated. On June 8, 1998, the BPD asked that HRD certify six additional test-takers as eligible for promotion. As a result, the BPD was able to promote all of

the officers with scores of 85, as well as the three minority officers with scores of 84. App. at 54, 75 (Am. Complaint, ¶ 34 and Exhibit G thereto).

The plaintiffs, who also scored 84 on the exam, were not among those officers promoted to sergeant. App. at 57-58 (Am. Complaint, ¶ 49). They allege that their scores qualified them for promotion, but also allege that the minority officers with identical scores were promoted "solely because of their race." App. at 57-58, 50 (Am. Complaint, ¶ 49 and ¶ 15).

V. SUMMARY OF ARGUMENT

An applicant seeking intervention as of right must demonstrate (i) a direct and substantial interest in the subject matter of the litigation; (ii) that its ability to protect the interest may be impaired if it is not allowed to intervene; and (iii) that its interest will not be adequately represented by an existing party. Because these requirements have been met, the district court erred in denying MAMLEO's motion to intervene. Although this Court usually reviews denials of intervention for abuse of discretion, the absence of any findings by the district court in support **[8]**of its order makes it impossible to determine whether the district court applied the Fed. R. Civ. P. 24 standard. Accordingly, the district court's order should be reviewed *de novo*. Even under the abuse of discretion standard, however, the denial of MAMLEO's motion should be reversed, on the ground that the district court's decision sufficiently fails to comport with the governing

standard as to indicate an abuse of discretion. (Pages 11-14)

The MAMLEO applicants have a sufficient interest in this litigation to warrant intervention under Rule 24. For over 20 years MAMLEO has represented the interests of black officers in connection with the BPD's promotional practices, and has been allowed to intervene in other cases challenging affirmative action promotions. In all of these cases, as in the instant case, the interests of MAMLEO and its members include ensuring (i) a discrimination-free workplace; (ii) the use of valid selection procedures; and (iii) an employer who will comply with Title VII by taking affirmative steps to eliminate adverse impact on minorities. MAMLEO has a "direct, substantial and compelling" interest in protecting the rights of its members with respect to these issues. Sergeants White and White also have a substantial personal interest in this litigation, as plaintiffs' claims are based, in part, on the allegations that their promotions were "solely because of their race," and as judgment in plaintiffs' favor would constitute a judicial determination that their promotions were unconstitutional. The interest of the public in this litigation is another factor militating in favor of allowing intervention. Although the district court made no findings on this point, its ruling reflects a failure to apply the Rule 24 standard and constitutes an abuse of discretion. (Pages 14-21)

There can be no doubt that MAMLEO's interests may be impaired by an adverse judgment in this case. Unless granted intervenor status,

MAMLEO and the individual intervenors will be powerless to defend their substantial interests, and Sgts. White and White will be powerless to defend the lawfulness and the **[9]**legitimacy of their promotions. The interests described above are among MAMLEO's principal organizational goals, which are shared by many of MAMLEO's members, but which are directly contrary to the plaintiffs' goals in this suit. MAMLEO's representation over the course of many years has helped to remedy the effects of discrimination within the BPD. A court order in this case prohibiting the BPD from considering race in making promotions would prevent the BPD from taking action to comply with its obligations under Title VII and the Guidelines to employ alternative selection procedures so as to avoid adverse impact upon minorities, and would make it unlawful for the BPD to engage in otherwise lawful affirmative action in promoting minority officers, even to avoid or to settle a discrimination claim. An adverse judgment therefore risks a significant roll-back of the gains that MAMLEO has achieved for its members over the past 20 years. Accordingly, if the plaintiffs prevail, the interests of MAMLEO and its constituents will be impaired, perhaps irreparably. Although the district court made no findings on this point, its ruling reflects a failure to apply the Rule 24 standard and constitutes an abuse of discretion. (Pages 22-23)

This Court has recognized two "converging presumptions" relevant to the question of inadequate representation: (i) that adequate representation is presumed when the goals of the applicants are

the same as those of an existing party; and (ii) that the government is presumed adequately to represent the *interests of all citizens, at least in* cases where it is defending the validity of a statute. These presumptions, however, may be rebutted. Here, where the governmental parties act not in their capacities as sovereigns but as defendants in an employment dispute, the presumption of adequate representation should not apply. Even assuming, however, that the presumption does apply, there exists sufficient adversity of interests between MAMLEO and the defendants to require intervention. Neither the BPD nor Hartnett has the same incentive as MAMLEO **[10]**to defend the lawfulness of affirmative action promotions. Hartnett certainly has no incentive to prove that the HRD's promotional test violates Title VII, as such an admission would call into question promotional exams administered by HRD throughout the Commonwealth. Nor can the BPD be expected to admit that discrimination continues to occur within the BPD; that the effects of proven past discrimination persist to this day; or that the BPD would have violated Title VII by making promotions in strict rank order. The conflicting interests of the defendants compel the conclusion that they may not adequately represent MAMLEO's interests, another issue on which the district court failed to make any findings. Whether reviewed *de novo* or for abuse of discretion, the district court's order should be reversed. At a bare minimum, the court's failure to make any findings in support of its order requires that the

the matter be remanded for further findings in accordance with Rule 24. (Pages 23-29)

Although not challenged below, MAMLEO's motion was more than timely under the generous standard of Rule 24. (Page 29-30)

Plaintiffs argued below that intervention should be denied because neither MAMLEO nor the individual officers whose promotions are challenged in this lawsuit have standing. Although the district court made no findings on this issue, as a matter of law, standing requirements cannot justify the denial of MAMLEO's motion to intervene. First, this Court has never required applicants for intervention to demonstrate standing and the Supreme Court has expressly reserved judgment on the question. Although the circuit courts have reached different conclusions on the issue, an apparent majority has expressly stated that intervenors need not demonstrate Article III standing. Indeed, a requirement that applicants seeking to intervene as defendants in trial court proceedings must demonstrate standing is doctrinally unsound, as standing requirements make no sense applied to a trial court defendant; nor would a requirement that applicants seeking to intervene as **[11]**defendants demonstrate standing promote any of the values served by the standing doctrine. Moreover, as there is no question that an Article III case and controversy is presented by the plaintiffs' claims against the existing defendants, and that standing requirements are satisfied as to the parties already in the case, well-settled precedent mandates that there is no need to verify the independent standing of the other parties. In all

events, to the extent that standing is relevant to analysis of MAMLEO's motion to intervene, its requirements are met here. Because, as defendants-intervenors, the MAMLEO applicants would not be raising a claim against the plaintiffs, what must be shown is not standing to raise a claim, but an interest sufficient to meet Article III's "case or controversy" requirements. For the same reasons that the MAMLEO applicants' "direct, substantial, and compelling" interests in this litigation satisfy Rule 24, their interests more than satisfy the requirements of standing. (Pages 30-33)

VI. ARGUMENT

A. The District Court Erred In Denying The MAMLEO Applicants' Motion To Intervene Under Rule 24, Whether The Order Is Reviewed Under An Abuse Of Discretion Or *De Novo* Standard.

1. Standard Of Review

Fed. R. Civ. P. 24(a), entitled "Intervention of Right," provides, in pertinent part,

> Upon timely application anyone *shall* be permitted to intervene in an action: ... (2) when the applicant claims an interest *relating* to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect

> that interest, unless the applicant's interest is adequately represented by existing parties.

(Emphasis supplied). Thus, a party seeking intervention as of right under Rule 24(a)(2) must demonstrate three things: "1) that it has a direct and substantial interest in the subject matter of the litigation; 2) that its ability to protect the **[12]**interest may be impaired if it is not allowed to intervene; and 3) that its interest will not be adequately represented by an existing party." International Paper Co. v. Inhabitants of the Town of Jay, Me., 887 F.2d 338, 342 (1st Cir. 1989) (citation omitted).

While acknowledging that some other circuits review denials of motions to intervene as of right *de novo,* this Circuit has adopted the abuse of discretion standard for review of denials of motions to intervene under Rule 24(a). See International Paper, 887 F.2d at 343-44. In so doing, however, this Court recognizes that "Rule 24(a) considerably restricts the court's discretion whether to allow intervention of right by providing that [a party meeting the requirements of Rule 24(a)(1) or (2)] '*shall* be permitted to intervene."' Id. at 344 (quoting Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring).

Accordingly, the International Paper Court concluded that, simply because denials of intervention under Rule 24(b) and Rule 24(a)(2) are both reviewed for abuse of discretion "does not mean that the scope of the review is identical." 887 F.2d

at 344. "Since the 'district court has *less* discretion to limit the participation of an intervenor of right than that of a permissive intervenor,' the abuse of discretion standard is 'more stringent' as applied to denials of intervention of right than as applied to denials of permissive intervention." Id. (quoting Stringfellow, 480 U.S. at 382) (Brennan, J., concurring). Thus, the denial of a motion to intervene as of right will be reversed "if the [district] court fails to apply the general standard provided by the text of Rule 24(a)(2), or if the court reaches a decision that so fails to comport with that standard as to indicate an abuse of discretion." International Paper, 887 F.2d at 344 (citations omitted).

Unlike the district court in International Paper, the district court here made no findings in support of its denial of MAMLEO's motion to intervene. In **[13]**Edwards v. City of Houston, 78 F.3d 983, 1000 (5th Cir. 1996), the Fifth Circuit Court of Appeals held that, where a district court fails to articulate reasons for its ultimate determination as to the timeliness of an intervention motion, review of that factor is *de novo,* rather than for abuse of discretion. See also League of United Latin Am. Citizens, 131 F.3d 1297, 1302 (9th Cir. 1997) ("[B]ecause the district court below denied [the] intervention motion *in a curt, one-sentence order without specifying whether or not its denial was premised upon a finding of* untimeliness, we have no way of determining whether it abused its discretion with regard to that element; consequently, we must review the timeliness issue in this case *de novo.*") (citation omitted) (emphasis

supplied).[4] For the same reasons, the district court's order should be reviewed *de novo,* since the absence of any findings makes it impossible to determine whether the district court, in fact, "fail[ed] to apply the general standard provided by the text of Rule 24(a)(2)." International Paper, 887 F.2d at 344.

Even under the abuse of discretion standard, however, the denial of MAMLEO's motion should be reversed on the ground that the district court's decision sufficiently fails to comport with the governing standard as to indicate an abuse of discretion. International Paper, 887 F.2d at 34. See Daggett v. **[14]**Commission on Governmental Ethics and Election Practices, 172 F.3d 104 (1st Cir. 1999); Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39 (1st Cir. 1992); Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987); Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999) (reversing denials of motions to intervene).

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[4] These cases comport with the First Circuit's reasoning in applying the *de novo* standard in other contexts, where the district court has failed to make findings. See United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995) ("Where, as here, the district court made no findings of fact with respect to its denial of the motion to suppress, this court reviews the record *de novo.*"); Piccicuto v. Dwyer, 39 F.3d 37, 40 (1st Cir. 1994) (holding that, where "bankruptcy court did not make any findings of fact entitled to deference," the district court should have reviewed bankruptcy court's legal determination *de novo*).

2. The MAMLEO Applicants Have A Substantial Interest In The Subject Matter Of This Litigation.

Although "there is no precise and authoritative definition of the interest required to sustain a right to intervene," an intervenor's claims "must bear a sufficiently close relationship to the dispute between the original litigants" and its interest must be "direct, not contingent." Conservation Law Found., 966 F.2d at 42 (internal quotations marks and citation omitted).

In the recent Daggett case, for example, the applicants for intervention were elected officials and candidates for office who sought to intervene in an action challenging the constitutionality of a Rhode Island statute providing for the public funding of election campaigns. In holding that the applicants' interest was sufficient to justify intervention, the Daggett Court noted that the intervenors would receive public funding for their campaigns only if the statute were upheld and that, although they "might not in a strict res judicata sense be 'bound' by the decision [of the district court]," the risk that they could be subject to a federal injunction against implementation of the statute "easily satisfied" Rule 24(a). 172 F.3d at 110.[5]

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[5] See also Conservation Law Found., 966 F.2d at 43 (commercial fishing groups whose businesses would be affected by plaintiff's attempt to outlaw overfishing had interest sufficient to justify intervention); Fiandaca, 827 F.2d at 833 (patients whose hospital facility might be affected by remedy proposed in prisoners' rights litigation had interest sufficient to permit intervention).

[15]The principle that both white and black public employees and applicants for public employment have an interest in the outcome of civil rights litigation concerning hiring and promotional procedures has been recognized, albeit without discussion, in civil rights cases filed in this Circuit. See, e.g., Castro v. Beecher, 459 F.2d 725, 729 n.2 (1st Cir. 1972) (noting that prior to trial, district court had allowed intervention by police applicants); Culbreath v. Dukakis, 630 F.2d 15, 19 & n.7, 21 (1st Cir. 1980) (citing Jackson v. Sargent, 394 F. Supp. 162, 173 (D. Mass. 1975)) (interpreting district court's invitation for intervention motions from interested parties at the outset of the case to mean that trial court would have granted intervention to white persons who might not be hired because of relief entered in the case and whose interests were not adequately represented by existing parties), Boston Chapter NAACP v. Beecher, 423 F. Supp. 696, 698 (D. Mass. 1976) (allowing intervention after entry of decree by candidates for promotion seeking to determine status of provisional appointments made after the decree); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 973 F.2d 18 (1st Cir. 1992) (noting that union had been allowed to intervene to be heard in opposition to extension of consent decree).

The rationale for allowing intervention in cases such as this one recently was addressed in Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999), in which the Sixth Circuit reversed two district courts' denials of motions to intervene brought in cases challenging the affirmative action admission

policies of a public university **[16]**and law school. The applicants for intervention in Grutter were people who either had applied or intended to apply to the schools, or who were currently enrolled there, as well as a non-profit organization whose mission was to preserve opportunities in higher education for minorities. The applicants' stated interest was in maintaining the use of race as a factor in the admissions process. 188 F.3d at 398. One of the district courts had denied intervention on the ground that such an interest was not sufficiently direct or substantial to warrant intervention. Id.

The Sixth Circuit reversed, holding that the applicants' interest in preserving the affirmative action policies of the schools was sufficient to warrant intervention in litigation designed to prohibit such programs. The Court rejected the plaintiff's argument that the absence of a consent decree meant that the applicants lacked a sufficient interest under Rule 24, holding that "[n]either a legislative context nor the existence of a consent decree is dispositive as to whether proposed intervenors have shown that they have a significant interest in the subject matter of the underlying case." 188 F.3d at 399. The Grutter Court went on to hold that, even in the absence of a consent decree, the applicants' interest in preserving affirmative action in the admissions process was "direct, substantial, and compelling." 188 F.3d at 399.[6]

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[6] See also Edwards v. City of Houston, 78 F.3d 983 (5th Cir. 1996) (reversing denial of motion to intervene filed by representatives of white officers prior to approval of consent decree); Jansen

[17]Applying these principles to the instant case compels the conclusion that the MAMLEO applicants have a sufficient interest in this litigation to warrant intervention under Rule 24. For over 20 years MAMLEO has represented the interests of black officers within the BPD in connection with the BPD's promotional procedures and practices, and has been allowed to intervene in other cases challenging affirmative action promotions within the BPD. See notes 2-3 *supra*.

MAMLEO's representation of the interests of black officers did not begin or end with the Consent Decree. In Superior Officers I, MAMLEO defended the lawfulness of a non-rank-order promotion that both the district court and this Court found was not required by the Decree. Prior to the commencement of that action, MAMLEO had asserted the interests of its members by lodging an objection with the BPD to the use of the 1992 Exam as a means of promoting candidates in

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v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990) (reversing denial of motion to intervene filed in reverse discrimination case by parties to affirmative action consent decree); In re Birmingham Reverse Discrimination Employment, 833 F.2d 1492, 1496 & nn.12, 13 (11th Cir. 1987) (parties to consent decree should have been allowed to intervene in action challenging race-conscious relief under the decree); Associated Gen. Contractors of Conn. v. City of New Haven, 130 F.R.D. 4 (D. Conn. 1990) (allowing intervention by minority contractor as defendant in action challenging the constitutionality of a minority set-aside statute); Associated Gen. Contractors of Cal. v. City and County of San Francisco, 1985 WL 153 (N.D. Cal. 1985) (allowing minority contractors and associations to intervene in case challenging constitutionality of affirmative action ordinance).

strict rank order of exam scores. On appeal, MAMLEO argued that, even assuming that the Decree did not apply, the 1992 Exam failed validly to distinguish among the qualifications of candidates who scored within three points of one another, and that promoting candidates in strict rank order of scores would have had an adverse impact on minorities and have been invalid under the Guidelines. Accordingly, **[18]**MAMLEO argued (both to the BPD and to this Court on appeal), that the BPD was authorized -- indeed obligated -- to explore alternative selection procedures that would produce less adverse impact, including the limited consideration of race as a plus factor among functionally equivalent candidates.

More recently, MAMLEO was permitted to intervene in another case currently pending before the district court challenging other promotions of MAMLEO members. The two officers whose promotions are there challenged also were permitted to intervene. See Superior Officers II, Civ. No. 98-10800-GAO. As in Superior Officers I, MAMLEO intervened in order to defend the use of affirmative action as a narrowly tailored means of addressing the adverse impact caused by the use of a strict rank order promotional scheme and as a permissible way for the BPD to "head off a potential discrimination claim" by MAMLEO and its members. See Superior Officers I, 147 F.3d at 23. In the state courts, MAMLEO intervened in Boston Police Dep't v. Abban, Suffolk Superior Court No. 99-0223-A, and is appealing the Superior Court's decision affirming a Civil Service ruling

holding that the BPD unlawfully promoted MAMLEO members in 1996. See generally Daggett, 172 F.3d at 116 (Lynch, J., concurring) (noting that it would be proper for district court ruling on motion to intervene to consider history of allowances of intervention in similar cases).

In all of these cases, MAMLEO has a substantial interest in ensuring that the BPD uses only valid promotional procedures under Title VII and the EEOC Guidelines, 29 C.F.R. §§ 1607.1-18, and that, when promotional procedures are not so validated, the BPD complies with its obligations under Title VII to explore alternative promotional procedures, including by engaging in limited affirmative action to remedy the discriminatory effects of selection practices, thereby protecting both the civil rights and economic interests of MAMLEO's members.

[19]Under Title VII of the Civil Rights Act of 1964, § 703(k), and under the Guidelines, if a selection procedure produces adverse impact upon minorities, and if an alternative selection method exists having substantial validity and less of an adverse impact, the employer must choose the less discriminatory method.[7] MAMLEO continues to assert that the promotional exams designed by HRD and employed by the BPD are not valid under the Guidelines because, at the very least, they

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[7] See 42 U.S.C. § 2000e-2(k); 29 C.F.R. § 1607.3 B; Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); v. Duke Power Co., 401 U.S. 424, 431-36 (1971); Allen v. Entergy Corp., 181 F.3d 902, 904 (8th Cir. 1999); Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994).

fail validly to distinguish among the comparative qualifications of candidates who score within certain ranges of one another. For example, part of a candidate's final score continues to be based, not on the actual exam grade, but on a training and experience component which, as this Court previously has noted, negatively impacts on blacks. Superior Officers I, 147 F.3d at 20. A rule of law requiring the BPD to follow slavishly the points obtained on a test that does not meet the requirements of the Guidelines and would require MAMLEO or its members to sue over every test, imposing an enormous burden on the organization and its members.

In addition, it is well settled that public employers may lawfully employ race-conscious affirmative action to remedy past discrimination if it furthers a compelling governmental interest and is narrowly tailored to serve that interest. E.g., Adarand Constr., Inc. v. Pena, 515 U.S. 200, 237 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986); Superior Officers I, 147 F.3d at 19. Like the intervenors in Grutter, MAMLEO has a "direct, substantial and **[20]**compelling" interest in ensuring that its members have access to valid, nondiscriminatory promotional mechanisms that comply with the requirements of the Constitution, Title VII, and the Guidelines, and ensuring that the BPD employs permissible race-conscious remedies to avoid unlawful adverse impact.

Sergeants Dennis A. White and Harold White also have a substantial personal interest in this litigation. Plaintiffs' claims are based, in part, on

the allegations that the promotions of these two persons was "solely because of their race." App. at 50 (Am. Complaint, ¶ 15). Judgment in plaintiffs' favor therefore would constitute a judicial determination that the promotions of Sgts. White and White were unconstitutional. Moreover, if plaintiffs prevail on their claims, the injunctive relief they have requested could prohibit the BPD from ever taking into account the race of these two sergeants in any future promotions they might seek, regardless of their contention that the promotional mechanisms used by the BPD violate their rights under Title VII and justify race-conscious remedial relief.

MAMLEO understands that the plaintiffs vigorously dispute MAMLEO's position that strict rank order promotions are invalid under the Guidelines and that race-conscious relief is appropriate if an invalid promotional test might otherwise cause adverse impact. It is that very dispute, however, that frames MAMLEO's interest in this case. Reduced to essentials, plaintiffs assert that the defendants unconstitutionally considered the race of certain candidates in promoting people who have achieved identical test scores. MAMLEO, in contrast, asserts that it would have been unlawful for the BPD to make promotions in strict rank order that excluded minority candidates because the test could not be shown to have validly demonstrated the superior qualifications of white officers who scored within a certain range of black officers. MAMLEO asserts that, under such circumstances, the limited use of race as a plus-factor is constitutionally permissible, a conclusion reached

by several courts. See Generally Superior Officers I, 147 F.3d at 24 n.5 **[21]**("We note that some courts, endorsing the 'banding' approach, have approved affirmative action plans allowing the employer to depart from strict rank order and promote minority candidates within a band of scores. See, e.g. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 723 (9th Cir. 1992); Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1144 (2d Cir. 1991); but see Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1487 (M.D. Ala. 1995) (noting that banding does not exempt race-based promotions from strict scrutiny), aff'd, 119 F.3d 9 (11th Cir. 1997).").

It is not enough for plaintiffs to respond that MAMLEO's views are wrong, or misguided (or both). Each side has a good-faith, sincere interest in this litigation, and all of their voices should be heard. Cf. Daggett, 172 F.3d at 113 ("The fact that the applicants may be helpful in fully developing the case is reasonable consideration in deciding on permissive intervention.").

As in Daggett, "This lawsuit is a far cry from a private fight. The rationale for intervention may have particular force where the subject matter of the lawsuit is of great public interest, the intervenor has a real stake in the outcome and the intervention may well assist the court in its decision through the production of. relevant evidence and the framing of the issues." 172 F.3d at 116 (Lynch, J., concurring) (citation omitted). See Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227, 1233 (1st Cir. 1992) (considering pub-

lic interest in litigation as factor favoring intervention).

For the foregoing reasons, the MAMLEO applicants have an interest sufficient to warrant intervention under Rule 24. Although the district court made no findings on this point, its ruling reflects a failure to apply the standard of Rule 24 and constitutes an abuse of discretion.

[22]3. The Interests Of The MAMLEO Applicants May Be Impaired If They Are Not Allowed To Intervene.

A proposed intervenor need only meet a minimal burden of showing that impairment of its legal interest is possible if intervention is denied. See Grutter, 188 F.3d at 399. Here, there can be no doubt that MAMLEO's interests may be impaired by an adverse judgment in this case. Unless granted intervenor status, MAMLEO and the individual intervenors will be powerless to defend the substantial interests described above, and Sgts. White and White will be powerless to defend the lawfulness and the legitimacy of their promotions.

For example, plaintiffs' amended complaint seeks injunctive relief against the defendants "as necessary to remedy the violations and to prevent further violations of the Plaintiffs' rights." App. at 63 (Am. Complaint). Put another way, plaintiffs seek a judgment that will prevent the BPD from engaging in the very type of race-conscious relief that MAMLEO asserts is required for the BPD to avoid liability to MAMLEO's members under Title

VII or, at a minimum, is constitutionally permissible in light of the history of discrimination within the BPD, its persistent effects, and the BPD's currently flawed promotional procedures.

An adverse judgment therefore risks a significant roll-back of the gains that MAMLEO has achieved for its members over the past 20 years. See Daggett, 172 F.3d at 110 (intervenors need not "in a strict res judicata sense be 'bound' by the decision" in order to satisfy Rule 24 (a)); International Paper, 887 F.2d at 344 ("the adverse impact of *stare decisis* standing alone may be sufficient to satisfy the practical impairment requirement"); Jansen, 904 F.2d at 343 (possibility of adverse *stare decisis* effects provides intervenors with a sufficient interest to join an action) (collecting cases); New York Pub. Interest Research Group, Inc. v. Regents of **[23]**Univ. of State of New York, 516 F.2d 350, 352 (2d Cir. 1975) (*stare decisis effect* of adverse decision can constitute impairment of intervenor's interest).[8]

Accordingly, if the plaintiffs prevail, the interests of MAMLEO and its constituents will be impaired, perhaps irreparably. Again, although the district court made no findings on this point, its ruling reflects a failure to apply the standard of Rule 24 and constitutes an abuse of discretion. See generally Grutter, 188 F.3d at 400 (interest of

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[8] Indeed, the district court already has stated that it "could not help but observe that embedded in all governmental efforts to eradicate racism by direct governmental action are a myriad of untested assumptions about 'race' that reinforce the coarsest type of racial stereotyping." Cotter, 73 F.3d at 63 n.1.

proponents of affirmative action would be impaired by judgment in favor of reverse discrimination plaintiff).

4. The Interests Of The MAMLEO Applicants In This Litigation May Not Be Adequately Protected By The Existing Parties.

In order to satisfy Rule 24(a)(2), an intervenor need show no more than that his interest *"may* be" inadequately represented by other parties, a burden which is to be "treated as minimal." See Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (emphasis supplied); Conservation Law Found., 966 F.2d at 44; Flynn v. Hubbard, 782 F.2d 1084, 1090 (1st Cir. 1986) (Coffin, J., concurring). See also Grutter, 188 F.3d at 400; Wright, Miller & Kane, § 1909, at 314-15 ("[T]he language of the rule clearly suggests that now [the proposed intervenor] is to be allowed in, if the other conditions of the rule are satisfied, unless the court is persuaded that the representation of him is in fact adequate."). "If the applicant shows that the representation *may be* inadequate . . . , then the **[24]**court is precluded from finding that the interest is adequately represented." Flynn, 782 F.2d at 1090 (citations omitted).

In Daggett, this Court recognized two "converging presumptions" relevant to the inadequate representation analysis: (i) that adequate representation is presumed when the goals of the applicants are the same as those of an existing party; and (ii)

that the government is presumed adequately to represent the interests of all citizens, at least in cases where it is defending the validity of a statute. 172 F.3d at 111. As the Daggett Court noted, however, "such presumptions can be rebutted." Id. Indeed, Daggett vacated and remanded the denial of a motion to intervene out of a concern that the trial court had mistakenly concluded that the only way to overcome those presumptions was to demonstrate "adversity of interest, collusion, or nonfeasance." 172 F.3d at 111 (citation omitted).

In a case such as this, adequacy of representation should not be presumed simply because a sovereign party appears to share the same goal as the applicant for intervention. Indeed, the Daggett Court noted that "the presumption in favor of adequate government representation often involve[s] the government suing as plaintiff in its parens patriae capacity . . . [or] where the government is defending a statute against attack. *Of course, there may be other cases involving government representation where no presumption is justified.*" 172 F.3d at 111 n.2 (citation omitted) (emphasis supplied). See also Mausolf v. Babbit, 85 F.3d 1295, 1303 (8th Cir. 1996) (where applicants' interest is not a sovereign interest, there is no reason to think the government will represent it). In the case at hand, where the state and local government are parties, not in their capacities as sovereigns but rather as defendants in an employment dispute, the presumption of adequacy of representation should not apply. Edwards, 78 F.3d at 1005 (presumption of adequacy when the state is a party applies only when the state is act-

ing as sovereign, not when it is sued as an employer).

[25]Even assuming, however, that the presumption does apply, there exists sufficient adversity of interests between MAMLEO and the defendants to require intervention. In Trbovich, for example, the Supreme Court reversed the denial of a motion to intervene, holding that the requirement of Rule 24 "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. at 538 n.10. The plaintiff in Trbovich was a union member who attempted to intervene in an action filed by the Secretary of Labor to set aside a union election. Although the intervenor's interests would have been represented by the government (the Secretary of Labor), the Court held that, because the Secretary was charged with the dual role of protecting the public interest in democratic union elections and enforcing the interests of individual union members, there was "sufficient doubt about the adequacy of representation to warrant intervention." 404 U.S. at 538. In the words of the Court, "Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.'" 404 U.S. at 539.

Similarly, in Conservation Law Found., this Court reversed the denial of a motion to intervene filed by commercial fishing groups despite the district court's conclusion that the intervenors were adequately represented by the Secretary of

Commerce. "The Secretary's judgments are necessarily constrained by his view of the public welfare. While the Secretary may well believe that what best serves the public welfare will also serve the overall interests of the fishermen, the fact remains that the fishermen may see their own interest in a different perhaps more parochial light." 966 F.2d at 44.

In Grutter, the Sixth Circuit applied the foregoing principles to the issue of whether a university sued for reverse discrimination in its admissions policies adequately represented the interests of applicants for intervention who sought to **[26]**preserve the use of affirmative action. Citing Trbovich for the proposition that only a "minimal" showing of inadequacy was required, Grutter held that the intervenors

> need show only that there is a potential for inadequate representation . . . . We find persuasive their argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and these may be important and relevant factors in determining the legality of a race-conscious admissions policy.

188 F.3d at 400-401.[9]

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[9] See also Associated Gen. Contractors of Conn., 130 F.R.D. at 11-12 (city did not adequately represent minority contractors who applied for intervention in case challenging set-aside program because intervenors might present different insight, arguments and

Neither the BPD nor Hartnett has the same incentive as MAMLEO to defend the lawfulness of affirmative action promotions. Hartnett certainly has no incentive to prove that the HRD's promotional test, including the weighted component for training and experience, violates Title VII by failing validly to distinguish among candidates for promotion or by resulting in an adverse impact **[27]**on minorities, as such an admission would call into question promotional exams administered by HRD throughout the Commonwealth.

Nor can the BPD be expected to admit that discrimination continues to occur within the BPD; that the effects of proven past discrimination persist to this day; or that the BPD would have violated Title VII by making promotions in strict rank order. Moreover, the BPD recently has demonstrated that it does not have the same commitment to defend its affirmative action policies as does MAMLEO. In December 1999, the BPD chose not to appeal a Superior Court decision affirming a Civil Service ruling invalidating six af-

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claims from the city, and have an economic interest in defending the set aside that is different than the city's interest); Avery v. Heckler, 584 F. Supp. 312 (D. Mass. 1984) (Commonwealth satisfied the inadequate representation requirement, since if the district court determined that plaintiffs' benefits were legally terminated, plaintiffs' interests and its interest would become adverse); Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) (interests of union applicants for intervention "could hardly be said" to be the same as municipal defendants and the court "would be hard pressed to find that the employers of the unions . . . would represent the interests of the unions . . . with the same vigor and advocacy as would the unions themselves").

firmative action promotions to sergeant and lieutenant and requiring the promotion of approximately 23 white officers and only one black officer before any additional promotions of minority officers may be made. Boston Police Dep't v. Abban, Suffolk Superior Court No. 99-0223-A. Had MAMLEO not been permitted to intervene in that case, there would be no prospect for reversing or modifying the effect of the Civil Service decision on the future racial composition of the BPD's workforce. The BPD's decision not to appeal the Abban judgment raises serious questions about whether it would appeal an adverse ruling entered in this case, a sufficient basis for a finding of inadequate representation.[10]

[28]The reality is that the City and HRD are parties to this case, not in their capacity as sovereigns representing the interests of the public at large, but as defendants in an employment dispute threatened with exposure to liability for damages and attorneys fees. If, as has been said, "an agency seeking to protect both the public interest and the interest of a private intervenor undertakes a task which on its face is impossible,"

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[10] Compare Daggett, 172 F.3d at 112 ("there is no indication that [the Attorney General] is proposing to compromise or would decline to appeal if victory were only partial"); Conservation Law Found., 966 F.2d at 44 (fact that Secretary entered into proposed consent decree with plaintiffs "does leave the [applicants for intervention] with the distinct feeling that the Secretary is less than wholeheartedly dedicated to opposing the [plaintiff's] aims"); Grutter, 188 F.3d at 400-401 (governmental defendants were unlikely to present evidence of past discrimination on their parts or of the disparate impact of their current practices).

Conservation Law Found., 966 F.2d at 44 (quotation omitted), then so too are the defendants in this action unable to dedicate themselves fully to the defense of their own interests and, at the same time, adequately represent MAMLEO's interests in ensuring that race-conscious relief remains available as a means to remedy the ongoing effects of past discrimination and the invalid promotional procedures still employed by the defendants.[11] As one commentator recently observed:

> **[29]**Without intervention by beneficiaries, affirmative action cases typically pit unsuccessful White applicants and counsel opposed to traditional civil rights enforcement against governments and other institutions with a history of racial bias and strong in-

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[11] See e.g. Wygant, 476 U.S. at 291 (O'Connor, J., concurring) (public employers may be "trapped between the competing hazards of liability to minorities if affirmative action is not taken . . . and liability to nonminorities if affirmative action is taken"); Grutter, 188 F.3d at 400 (interests of intervenors not adequately represented by state university; reversing district court order denying intervention as of right); Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1001 (8th Cir. 1993) (potential conflict that would result from the substantial divergence of interests between the state and the intervenors if the case were settled sufficient to show inadequacy of representation; reversing district court order denying intervention as of right); Conservation Law Found., 966 F.2d at 44-45 (interests of regulated fishing groups not adequately represented by federal agency in suit filed by public interest organization seeking more extensive regulation by that agency; reversing district court order denying intervention as of right); Jansen, 904 F.2d at 342-44 (proposed intervenors' interest in litigation challenging race-conscious employment remedy not adequately represented by defendant City); Associated Gen. Contractors, 130 F.R.D. at 11-12 (City did not adequately represent interests of minority-owned businesses).

centives to avoid confessing civil rights liability. None of those parties have an unencumbered interest in identifying or preserving the constitutional or statutory obligations of public institutions to halt, avoid, and remedy discrimination against people of color; indeed, maintaining those obligations is contrary to the central interests of both sides. Furthermore, each party in a bipolar affirmative action case faces strong disincentives to presenting evidence of recent discrimination by the defendant or questioning the validity of standardized tests and other selection criteria that may discriminatorily exclude certain classes of applicants.

Yet those issues are at the core of litigation regarding the validity of affirmative action policies. In ruling on race-conscious remedies, moreover, courts necessarily make legal and factual findings that affect the rights and opportunities of people of color beyond the narrow context of a particular challenged policy. Those rulings can have the effect of vitiating a defendant's duty to prevent and remedy racial bias. Therefore, at stake for minority beneficiaries is not only the loss of affirmative action policies, but also adverse legal and factual findings that can further erode their rights and opportunities.

Jenkins, Foxes Guarding the Chicken Coop: Intervention as of and the Defense of Civil Rights Remedies, 4 Mich. J. Race & L. 263, 268-69 (1999) (footnotes omitted).

In sum, the conflicting interests of the defendants compel the conclusion that they may not adequately represent the interests of MAMLEO, another issue on which the district court failed to make any findings. Whether reviewed *de novo* or for an abuse of discretion, the district court's order should be reversed.

5. MAMLEO's Intervention Motion Was Timely.

Neither the district court nor the plaintiffs below suggested that MAMLEO's motion was not timely, and properly so. The motion was filed less than six months after the action was commenced, and one month before the district court **[30]**established a discovery schedule. Under the generous standard of Rule 24, the motion was more than timely.

B. The Standing Doctrine Does Not Preclude Intervention By The MAMLEO Applicants As Party Defendants In This Litigation.

Plaintiffs argued below that intervention should be denied because neither MAMLEO nor the individual officers whose promotions are challenged in this lawsuit have standing. Although the district court made no findings on this issue, as a

matter of law, standing requirements cannot justify the denial of MAMLEO's motion to intervene.

First, this Court has never required applicants for intervention to demonstrate standing and the Supreme Court has expressly reserved judgment on the question. See Daggett, 172 F.3d at 109 (citing Diamond v. Charles, 476 U.S. 54, 68-69 & n.21 (1986)); United States v. AVX Corp., 962 F.2d 108, 120 (1st Cir. 1992). Indeed, in at least one case, this Court suggested that intervenors need not demonstrate standing in district court proceedings, see AVX, 962 F.2d at 114 (intervenor's standing "immaterial in the lower court"), a conclusion that finds further support in this Court's more recent decision in Sea Shore Corp. v. Sullivan, 158 F.3d 51 (1st Cir. 1998). There, the Court stated, "We cannot assume standing to appeal merely because the party was appropriately permitted to intervene in the proceedings below," 158 F.3d at 55, and cited in support AVX, 962 F.2d at 112, for the proposition that "when the original state defendant does not appeal, the intervenor can no longer 'ride the state's coattails' and 'derive the benefit of the state's standing.'" See Avery v. Heckler, 584 F. Supp. 312, 316 n.3 (D. Mass. 1984) (intervenor need not have the standing necessary to initiate the lawsuit).

[31]Although the circuit courts have reached different conclusions on the issue, an apparent majority has expressly stated that intervenors need not demonstrate Article III standing,[12] and

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[12] See Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999); Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998), cert. denied, 119 S. Ct. 2046 (1999); Portland Audubon Soc'y v. Hodel, 866 F.2d 302,

the Seventh Circuit has held that any interest of a magnitude sufficient to warrant intervention as of right is sufficient to satisfy the Article III standing requirement as well. See Transamerica Ins. Co. v. South, 125 F.3d 392, 396 n.4 (7th Cir. 1997). Indeed, a requirement that applicants seeking to intervene as defendants in trial court proceedings must demonstrate standing is doctrinally unsound, as standing requirements make no sense applied to a trial court defendant. See Goldin v. Bartholow, 166 F.3d 710, 720-21 (5th Cir. 1999) ("courts have recognized that the standing inquiry is fundamentally different in the rare case where the defendant is its focus") (citing People v. Highland Irrigation Co., 893 P.2d 122, 127 (Colorado 1995) (en banc) ("rules for determining whether a plaintiff has standing are simply inapplicable to the defendants").[13]

[32]Nor would a requirement that applicants seeking to intervene as defendants demonstrate standing promote any of the values served by the

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308 n.1 (9th Cir. 1989); Chiles v. Thornburgh, 865 F.2d 1197, 1212-13 (11th Cir.1989); United States Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir.1978).

[13] See generally Munoz-Mendoza v. Pierce, 711 F.2d 421, 424 (1st Cir. 1983) ("The principles of standing are primarily aimed at determining whether a particular plaintiff is the type of person whom the law intends to protect against the type of harm of which he complains."); (citation omitted). See also Raines v. Byrd, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit . . . ."); Fletcher, The Structure of Standing, 98 Yale L. J. 221, 223 (1988) ("the essence of a true standing question is . . . [does] the plaintiff have a legal right to judicial enforcement of an asserted legal duty?").

standing doctrine. See Chemerinsky, Federal Jurisdiction, § 2.3.1 (2d ed. 1994). As Professor Chemerinsky explains, "Standing is the detennination of whether a specific person is the proper party to bring a particular matter to a federal court for adjudication." Id. at p.53. Addressing the standing doctrine in the context of motions to intervene, another commentator has clarified, "Standing . . . has traditionally been viewed as what the federal judiciary demands of those who wish to commence litigation. . . . Intervention of right, by comparison, is what judges require of an applicant that wishes to participate in litigation, in which the plaintiff has standing, before the court enters an order that may prejudice the applicant." Tobias, Standing to Intervene, 1991 Wis. L. Rev. 415, WL pp. 5-6. See id. at WL p.8 n.131 (reading Bryant v. Yellen, 447 U.S. 352, 367-68 (1980), "as an implicit rejection that applicants must have standing"); 7C Wright, Miller, and Kane, § 1917, p.457 ("Intervention presupposes the pendency of an action in a court of competent jurisdiction . . . .").

Moreover, as there is no question that an Article III case and controversy is presented by the plaintiffs' claims against the existing defendants, and that standing requirements are satisfied as to the parties already in the case, "settled principle[s]" dictate that there is no need to "verify the independent standing of the others." Houlton Citizen's Corp. v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999) (and cases cited therein). See also Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981).

In all events, to the extent that standing is relevant to analysis of MAMLEO's motion to intervene, its requirements are met here. Because, as defendants-intervenors, the MAMLEO applicants would not be raising a claim against the plaintiffs, what must be shown is not standing to raise a claim, but an **[33]**interest sufficient to meet Article III's "case or controversy" requirements. The substantial interests of the MAMLEO applicants, described in Section A, *supra,* demonstrate that "the applicants have a sufficient stake in the outcome to meet the rather modest requirements of Article III." See Daggett, 172 F.3d at 109. See generally Transamerica, 125 F.3d at 396 n.4; see also Munoz-Mendoza v. Pierce, 711 F.2d 421, 426 (1st Cir. 1983); Jenkins, 4 Mich. J. Race & L. at 264 n.2 (citing cases). For its part, MAMLEO satisfies the requirements of associational standing in that (i) MAMLEO's members have standing in their own right -- e.g., Sgts. White and White, as well as other MAMLEO members who are candidates for promotion; (ii) the interests sought to be vindicated by MAMLEO are pertinent to the objectives for which the organization was founded; and (iii) the claims asserted and the relief requested by MAMLEO do not necessitate the personal participation of affected individuals. See AVX, 962 F.2d at 116 (and cases cited therein) (discussing principles of associational standing).

[34]VI. CONCLUSION

For the foregoing reasons, the district court's order denying MAMLEO's motion to intervene should be reversed.

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE, AND HAROLD WHITE

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Certificate of Compliance Under Fed. R. App. 32(a)(7)

I, Rheba Rutkowski, hereby certify that, based upon the word and line count of the word processing system used to prepare this brief, the brief contains 10,780 words and 1,027 lines.

/s/
Rheba Rutkowski

ADDENDUM

[00114]UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WINIFRED N. COTTER, VINCENT J. DIFAZIO, JOHN P. DORIS, MICHAEL J. DWAN, WILLIAM G. KNECHT, MICHAEL LOCKE, PATRICK L. MURPHY, AND, THOMAS L. SEXTON,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 99-CV-11101-WGY
CITY OF BOSTON, JAMES J. HARTNETT, JR. in his official capacity as PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, HUMAN RESOURCES DIVISION,	)	
Defendants.	)	

PARTIALLY ASSENTED-TO MOTION TO INTERVENE

The Massachusetts Association of Minority Law Enforce ("MAMLEO"), Dennis A. White, and Har-

old White (collectively, "Applicants") hereby move for leave to intervene as party defendants in this action, pursuant to Fed. R. Civ. P. 24(a) or (b). As grounds for their motion, the Applicants state as follows:

1. The plaintiffs commenced this reverse discrimination action to challenge the lawfulness of the process by which three minority officers of the Boston Police Department ("BPD"), Dennis A. White, Harold White, and John M. Johnson, were selected, while plaintiffs were not selected, for promotion to the rank of sergeant. The challenged promotions resulted from a promotional exam administered by, upon information and belief, the BPD and the Massachusetts Human Resources Division in 1996 (the "1996 Exam"). Each of the three minority officers who were selected for

Nov 23, 1999
YOUNG D.J.
MOTION DENIED, MAMLEO shall, however, be included on the service list for all pleadings in this litigation and shall have the right to file amicus briefs at every state. The Court will decide as necessary whether to afford MAMLEO an opportunity to be heard orally.

U.S. District Judge William G. Young

DOCKETED

No. 00-563

IN THE

Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In its present posture, the only question presented by this case is whether, in a civil rights suit alleging that the defendants unconstitutionally considered race in making promotions, intervention as of right should have been allowed to two minority police officers, whom the petitioners allege were promoted "solely because of their race," and to a minority organization that for over twenty years has represented the interests of minority candidates for promotion within the Boston Police Department.

CORPORATE DISCLOSURE STATEMENT

The Massachusetts Association of Minority Law Enforcement Officers is a corporation that has no parent corporation and is not owned in whole or in part by any publicly held company.

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No. 00-563

In the Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,

Petitioners,

v.

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 219 F.3d 31 and is reproduced at Petitioners' Appendix ("Pet. App.") 1a–14a. The decision of the district court, which was without opinion, is reproduced at Pet. App. 72a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on July 17, 2000. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on August 10, 2000. The jurisdiction of this Court is invoked by the petitioners under 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

Federal Rule of Civil Procedure 24(a)(2), which provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Respondents respectfully submit that the Fourteenth Amendment is not at issue in the present posture of this case.

STATEMENT

A. Prior Proceedings

Petitioners seek review of a judgment of the Court of Appeals for the First Circuit, reversing an order of the federal district court for the District of Massachusetts and remanding the case with directions to allow intervention as of right to respondents Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"), and Boston Police Department Sergeants Dennis A. White and Harold White (collectively, the "MAMLEO applicants" or the "MAMLEO intervenors").

Petitioners, eight officers employed by the Boston Police Department ("BPD"), commenced this action in federal district court on May 21, 1999, alleging that their constitutional rights were violated by the promotion to sergeant of three minority officers of the BPD (including the two individual applicants for intervention). Like the minority officers whose promotions they

challenge, petitioners each scored 84 on a promotional examination administered in October 1996 ("1996 Exam").

The initial complaint named as defendants the BPD; Paul F. Evans, the Commissioner of the BPD; Edward P. Callahan, Director of Human Resources for the BPD; and the Commonwealth of Massachusetts, Executive Office for Administration and Finance, Human Resources Division (the "HRD"). On July 29, 1999, the petitioners amended their complaint to name only two defendants, the City of Boston and James J. Hartnett, Jr., in his official capacity as the Personnel Administrator of the HRD.

On August 3, 1999, Hartnett moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the claims against him, which motion was denied by the district court on October 20, 1999. *See Cotter v. City of Boston*, 73 F. Supp.2d 62 (D. Mass. 1999).

On November 9, 1999, the MAMLEO applicants timely filed a motion to intervene as defendants. The existing defendants assented to the motion but the petitioners opposed it. Pet. App. 72a. The district court denied the motion on November 23, 1999, without making any findings in support of the order and without hearing oral argument or conducting an evidentiary hearing on the matter.

On December 30, 1999, MAMLEO timely noticed an appeal and filed with the district court a motion to stay the proceedings, pending resolution of its appeal. The defendant City of Boston assented to the motion to stay and defendant Harnett took no position on the motion. Although the petitioners advised MAMLEO that they would oppose the motion to stay, the district court denied the motion on January 5, 2000, prior to the filing deadline for the petitioners' opposition papers.

On January 14, 2000, the MAMLEO intervenors filed with the First Circuit a motion to stay pending appeal. Petitioners filed their opposition on January 26, 2000. On

February 8, 2000, the First Circuit denied the motion but established an expedited briefing schedule on appeal.

On July 17, 2000, the First Circuit vacated the district court's order and remanded the case with directions to allow intervention as of right to the MAMLEO applicants. *See* Pet. App. 14a. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on August 10, 2000.

The district court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(3) and 1343(4) because plaintiffs' claims arise under the Constitution and laws of the United States and because plaintiffs seek injunctive relief and damages for the alleged deprivation under color of state law of civil rights secured under the Constitution and Acts of Congress. Jurisdiction in the court of appeals was proper as an appeal from a denial of a motion to intervene as of right. *See* Pet. App. 4a (citing *Flynn v. Hubbard*, 782 F.2d 1084, 1086 (1st Cir. 1986)); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377-78 (1987).

B. Factual Background

1. MAMLEO's History Of Representing Minority BPD Officers

For the past 20 years, MAMLEO has played a crucial role in the integration of the BPD. Among other things, MAMLEO served as the class representative of "[a]ll present and future black sworn officers in the [BPD]," pursuant to a consent decree entered in 1980 in the federal case *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, Civ. No. 78-529-McN ("Consent Decree"). Various provisions of the Consent Decree, including affirmative action goals and timetables for promotions to sergeant, were affirmed by the First Circuit on three separate occasions. *See Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 973 F.2d 18 (1st Cir. 1992); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991);

Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1st Cir. 1985).

As the representative of minority BPD officers, MAMLEO has been allowed to intervene in cases challenging the use of affirmative action pursuant to the Consent Decree, as well as in cases involving the use of affirmative action outside the context of the Consent Decree. *See Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (allowing MAMLEO to intervene in case challenging promotions pursuant to Decree); *Boston Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998) (allowing MAMLEO to intervene in case challenging affirmative action not mandated by Decree); *Boston Police Superior Officers Fed'n v. City of Boston*, Civ. No. 98-10800-GAO (allowing MAMLEO and individual officers to intervene in case challenging affirmative action not mandated by Decree); *Boston Police Dep't v. Abban*, Suffolk Superior Court No. 99-0223-A (allowing MAMLEO to intervene on appeal in civil service challenge to affirmative action).

2. The Promotions At Issue In This Case

On October 19, 1996, the HRD administered a promotional exam for the position of sergeant within the BPD ("1996 Exam"). On or about October 17, 1997, the HRD certified to the BPD a list of 69 candidates who had achieved the highest scores on the 1996 Exam.

On December 26, 1997, the BPD wrote to the HRD, stating its intent to promote three black officers who scored 84 on the 1996 Exam ahead of six white officers with scores of 85. *Cf. Superior Officers*, 147 F.3d at 24 (noting HRD's determination that, with respect to *1992* promotional exams, candidates who scored within three points of one another were "equally qualified"). The BPD stated that it was promoting the three black officers in order to ensure "compliance with current EEOC guidelines and applicable federal and state anti-discrimination laws." *See Superior Officers*, 147 F.3d at 21

(affirming BPD's determination that promotions in strict rank order would have supported inference of discriminatory impact under EEOC Guidelines). On January 15, 1998, the BPD advised the HRD of the effect that promotions made in strict rank order, without regard to race, would have on the racial composition of the sergeant workforce.

On February 2, 1998, the HRD advised the BPD that it did not accept the proffered justification for promoting three black officers with scores of 84 ahead of six white officers with scores of 85. Faced with the HRD's position, the BPD, in effect, capitulated. On June 8, 1998, the BPD asked the HRD to certify six additional test-takers as eligible for promotion. As a result, the BPD was able to promote all of the officers with scores of 85, as well as the three minority officers with scores of 84.

The petitioners, who also scored 84 on the exam, were not among those officers promoted to sergeant. They allege that their scores qualified them for promotion, but also allege that the minority officers with identical scores were promoted "solely because of their race."

ARGUMENT

The petition for writ of certiorari should be denied because the First Circuit correctly stated and applied the law governing intervention as of right, and because the questions presented for review by the petitioners are not properly before this Court.

1. Further review of the decision below is unwarranted because the First Circuit correctly stated and applied the law governing intervention as of right and because the decision below does not conflict with any decision of this Court or any other court of appeals on the same matter. *See* Supreme Court Rules 10, 11.

a. The only issue on appeal before the First Circuit -- from the only immediately appealable order in the case to date -- was whether MAMLEO and the individual applicants, Sgt. Dennis White and Sgt. Harold White, were entitled to intervene in this case as of right. As the First Circuit recognized, the merits of the case were not before it. Pet. App. at 3a (acknowledging same). The First Circuit correctly stated and applied the governing law in determining that MAMLEO and the individual applicants were entitled to intervene in this case in order to defend the use of racial criteria as a lawful measure to remedy discrimination within the BPD.

Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right, provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A party timely seeking intervention as of right under Rule 24(a)(2) thus must demonstrate three things: "1) that it has a direct and substantial interest in the subject matter of the litigation; 2) that its ability to protect the interest may be impaired if it is not allowed to intervene; and 3) that its interest will not be adequately represented by an existing party." *International Paper Co. v. Inhabitants of the Town of Jay, Me.*, 887 F.2d 338, 342 (1st Cir. 1989) (citation omitted).

As a threshold matter, the First Circuit rejected the petitioners' argument that intervention should be denied on the ground that the MAMLEO applicants lack standing. The First

Circuit explained that, "in the ordinary case, an applicant who satisfies the 'interest' requirement of [Rule 24(a)(2)] is almost always going to have a sufficient stake in the controversy to satisfy Article III." Pet. App. at 5a (citing *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997)). Noting that "it may be that there are unusual cases where an intervenor could satisfy the interest requirement of Rule 24(a)(2) without having the stake in the controversy needed to satisfy Article III," the First Circuit concluded that no such "peculiar circumstances" were urged in this case and, therefore, there was no occasion for the First Circuit to consider "the abstract question whether an intervenor-defendant must show some separate form of standing." Pet. App. at 5a. Accordingly, the First Circuit turned to the question whether the MAMLEO applicants satisfied the requirements for intervention under Rule 24(a)(2). Pet. App. at 5a-14a.

As to whether the individual applicants claim "an interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), the First Circuit concluded that the gravamen of the complaint "amounts to saying that their promotions were based on an unconstitutional decision or process, and to say that an officer has no interest in defending his own promotion would be to defy common sense." Pet. App. at 7a. The First Circuit added that, although the complaint does not ask that the promotions of the three minority officers be voided, "the plaintiffs do not make the final decision as to what relief should be afforded if the district court does find a constitutional violation." Pet. App. at 7a.

As to whether "the intervention applicants' ability to protect their interest 'may' be 'impair[ed] or impede[d]' if they are not allowed to intervene, Fed. R. Civ. P. 24(a)(2)," Pet. App. at 8a, the First Circuit concluded, "even a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for finding that their ability to protect their interest 'may' be adversely affected." Pet. App. at 8a (citing cases).

Regarding the adequacy of representation issue, the First Circuit held that, "[i]n this case, enough likelihood of conflict or divergence of interests exists to defeat any claim that 'the applicant's interest is adequately represented by the existing parties,' Fed. R. Civ. P. 24(a)(2)." Pet. App. at 9a.

Although it found more difficult the question whether MAMLEO, the organization, was entitled to intervene, the First Circuit determined under well-settled precedent that MAMLEO satisfied the requirements of Rule 24(a)(2). In the course of its analysis, the First Circuit recognized that, although a civil rights case involving employment "may be sparked by a particular episode, the decision may be likely to control an ongoing process within the department or agency for formulating rules for advancement and so predictably affect the interests of others who are already employed by the same institution and who will in turn be seeking advancement." Pet. App. at 12a-13a. Since a number of MAMLEO's members are likely to seek promotion to sergeant in the future, "the outcome of this case may very well determine how the [BPD] handles, and is allowed to handle, comparable situations almost certain to arise in the future, and the likely impact on other MAMLEO members seems to us substantial, predictable and far more concrete than some general interest in precedent." Pet. App. at 13a.

The First Circuit went on hold that MAMLEO satisfied all the requirements of Rule 24(a)(2), concluding that, "[i]f plaintiffs prevail and as a result the [BPD] is constrained to ignore race entirely in all future promotions, other MAMLEO members may well lose promotion opportunities" and that "the potential conflict between MAMLEO and the [BPD] on how best to defend the consideration of race in promotions is enough to show that the interest of MAMLEO members is not 'adequately represented by existing parties,' Fed. R. Civ. P. 24(a)(2)." Pet. App. at 13a-14a.

As the preceding section demonstrates, the First Circuit correctly stated and applied the law governing intervention.

Petitioners do not argue otherwise; nor do they demonstrate a conflict between the decision below and a decision of this Court or any other court of appeals on the issue of intervention. Rather, petitioners argue that the decision below somehow contravenes Article III standing doctrine and the Fourteenth Amendment standard for determining the lawfulness of race-conscious decisionmaking. None of the petitioners' arguments justify review by this Court of the First Circuit's decision, as discussed further below.

b. Petitioners' second question asks this Court to decide the question reserved in *Diamond v. Charles*, 476 U.S. 54 (1986) -- i.e., whether an applicant for intervention must demonstrate Article III standing. This question is not properly before this Court, however, as the First Circuit expressly did *not* decide whether an applicant for intervention must demonstrate Article III standing. *See* Pet. App. 5a; Supreme Court Rule 11.

i. This Court has stated that the authority to grant certiorari before a decision by a court of appeals is a "power not ordinarily to be exercised," *The Three Friends*, 166 U.S. 1, 49 (1897), and has long held that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed," *Duignan v. United States*, 274 U.S. 195, 200 (1927) (collecting cases). *See* Supreme Court Rule 11. The cases to this effect are legion. *E.g.*, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below") (citing *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address issues not sufficiently developed below for the Court to assess them); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to decide in the first instance an issue on which the trial and appellate courts did not focus)); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (declining to consider question addressed by neither the district court nor the court of appeals). As observed by one commentator, "[a] grant of certiorari before judgment denies the Court the benefit of court of appeals deliberation, and

in cases of special interest and contemporary importance may undesirably deprive the parties of the opportunity for reflection and adjustment of their own positions." 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4036 at 20-21 (1988).

ii. No exceptional circumstances are present in this case such as might warrant review by this Court of questions not yet decided in the first instance by the district court and the court of appeals. *See* Supreme Court Rule 11. Thus, to the extent that there is a conflict in the circuits regarding the question reserved in *Diamond v. Charles*, the occasion for resolution of that question by this Court is not presented by the decision below.

iii. In all events, the First Circuit correctly stated and applied the governing law, both in ruling that the MAMLEO applicants have standing, Pet. App. at 5a, 11a & n.3, and in determining that the MAMLEO applicants met the requirements of Rule 24(a)(2), Pet. App. at 6a-14a. Moreover, the petitioners have failed to demonstrate that this case presents an unusual circumstance in which the applicants for intervention "satisfy the interest requirement of Rule 24(a)(2) without having the stake in the controversy needed to satisfy Article III." Pet. App. at 5a. Because the First Circuit correctly held that the MAMLEO applicants have standing, a decision by this Court that applicants for intervention must demonstrate standing would not change the outcome of the decision below. The petitioners' question two therefore calls for an impermissible advisory opinion. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911).

c. To the extent that the petitioners otherwise claim error in the First Circuit's intervention analysis, the petitioners' arguments are unavailing.

i. The petitioners erroneously contend that the First Circuit "specifically consider[ed] the individual circumstances of the individual members of the [MAMLEO] organization" in violation of this Court's decisions in

International Union v. Brock, 477 U.S. 274 (1986), and *Hunt v. Washington State Apples Advertising Comm'n*, 432 U.S. 333 (1977). Pet. Br. at 23-24.

Neither *Brock* nor *Hunt* held that organizational standing and the standing of individual members of the organization are mutually exclusive. Rather, the third prong of the three-part test for organizational standing applied in the *Brock* and *Hunt* cases merely requires that individual members of the organization seeking to establish standing must not be "'indispensable to proper resolution of the cause.'" *Hunt*, 432 U.S. at 343 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Applying these principles to the instant case, it could not be more clear that the First Circuit did *not* hold that the participation of individual MAMLEO members was "indispensable." Rather, the First Circuit appropriately considered the circumstances of Sgt. Dennis White and Sgt. Harold White in evaluating their individual applications for intervention. Pet. App. 7a-10a.

Even if this Court were to find that the First Circuit misapplied the law governing organizational standing, this would not justify further review of the decision below by this Court because the First Circuit properly stated the governing law. *See* Supreme Court Rule 10. Moreover, a decision by this Court concerning the First Circuit's organizational standing analysis would not change the outcome of the decision below – i.e., the presence of intervenors in the case -- as the organizational standing test does not apply to individuals and the First Circuit correctly held that the individual applicants were entitled to intervene as of right. Accordingly, such a decision would constitute an impermissible advisory opinion. *See Muskrat,* 219 U.S. at 362.

ii. The petitioners also erroneously assume that the Fourteenth Amendment strict scrutiny standard for determining the lawfulness of race-conscious decisionmaking somehow controls analysis of the intervention question. *See, e.g.*, Pet. Br. at 8, 16-17; 19-20; 27-28. As the First Circuit recognized,

however, the merits of the case are not before the court in determining a motion to intervene, *see* Pet. App. 3a, and the petitioners cite no authority for the proposition that the standard by which the merits of the case ultimately will be determined governs the intervention analysis. Because the First Circuit properly did not apply the Fourteenth Amendment strict scrutiny standard to the question whether intervention as of right should be granted, the decision below presents no occasion for further review by this Court.

2. Further review of the decision below is unwarranted because the petitioners' first, third, and fourth questions are not properly before this Court, as they exceed the scope of the only immediately appealable issue in this case -- whether the MAMLEO applicants should be allowed to intervene under the law governing intervention as of right -- and because these questions concern evidentiary and other issues related to the merits of the case that have not been decided in the first instance by the district court and reviewed by the court of appeals.

a. In their first question, the petitioners ask this Court to resolve a purported conflict in the circuits as to whether an intervenor can enlarge the issues beyond those that the original parties wish to litigate. Even assuming that there is a conflict in the circuits on this point, the question is not properly before this Court.

i. This issue was expressly *not* decided by the court of appeals. *See* Pet. App. 10a (declining to take a position on the issue). Thus, to the extent that there may be a circuit split on this issue, the question is not raised by the decision below. Because neither the district court nor the court of appeals has considered and ruled on the issue, petitioners' first question is not "ripe" for review by this Court. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

ii. Contrary to the petitioners' argument, as a factual matter, inquiry into the 1996 Exam would not "enlarge the issues" in this litigation concerning the BPD's use of affirmative action. First, while the factual basis for the petitioners' argument appears to be their contention that the 1996 Exam was never considered or relied upon by the City (i.e., the BPD) in making the challenged promotions, Pet. Br. at *3-4, 25*, the defendant City of Boston has disputed that contention.

Moreover, the ultimate question presented by this litigation is whether the action challenged by the petitioners was justified under the governing federal law. The amended complaint seeks injunctive relief against the defendants "as necessary to remedy the violations and to prevent further violations of the Plaintiffs' rights." Petitioners thus seek a judgment that will prevent the BPD from engaging in the type of race-conscious relief that the MAMLEO intervenors assert is either required for the BPD to avoid liability to MAMLEO's members under Title VII or, at the very least, is constitutionally permissible.

There can be no doubt that this lawsuit challenges the BPD's selection procedures, of which the promotional exam and placement of candidates on the eligible list are inseparable components. Thus, inquiry into the validity of the BPD's selection procedures does not constitute an "enlargement of the issues," as petitioners contend. Contrary to the petitioners' arguments, the "discrimination" at issue in this case is not limited to the BPD's alleged act of considering race when making promotions from among candidates with the same score. Rather, any discrimination that might have occurred in the process that resulted in the placement of candidates on the eligible list is necessarily at issue as well. *See United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 504 (6th Cir. 1993) ("The subject matter of an action is not limited by the complaint.") (Merritt, C.J., concurring).

In all events, at this stage of the litigation, in which the parties are still engaged in discovery, any conclusions concerning what the BPD did or did not consider when making the challenged promotions are entirely premature.

iii. As a legal matter, even if MAMLEO does seek *to introduce issues and evidence different from that offered by* the original defendants, Rule 24(a)(2) clearly contemplates this. To hold otherwise would be to read the "adequacy of representation" inquiry out of Rule 24(a)(2). *See* Pet. App. 55a-63a (MAMLEO applicants' discussion of the "adequacy of representation" issue).

b. Petitioners' third question is not properly before this Court because it concerns evidentiary and other issues related to the merits of the case, which were neither addressed by the First Circuit in the decision below nor ruled upon by the district court in the first instance, and which do not constitute grounds for denying intervention.

i. Because the petitioners' third question concerns evidentiary and other issues related to the merits of the case, which were not considered by the First Circuit and which have not been ruled upon by the district court, this question is not properly before this Court. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

ii. Petitioners repeatedly misstate the First Circuit's reasons for holding that the MAMLEO intervenors satisfied the standard for intervention as of right – e.g., claiming that the First Circuit allowed intervention based upon MAMLEO's "suggestion that they might challenge the fairness of the Exam," *e.g.*, Pet. Br. at 6-8; or because of MAMLEO's purported "intention to possibly enlarge the issues in the Petitioners' lawsuit," *e.g.*, Pet. Br. at 21. There is no support for these misstatements, which unduly restrict the basis for intervention by the MAMLEO intervenors, both as matter of the expressed intent

of the MAMLEO intervenors, and as a matter of the First Circuit's understanding of that intent.

Far from assuming that the MAMLEO applicants sought intervention solely to challenge (possibly) the 1996 Exam, the First Circuit correctly recognized that the MAMLEO applicants sought to intervene in this action for the much broader purpose of defending the use of racial criteria as a lawful remedial measure under the circumstances presented here. Pet. App. 9a-10a. Thus, even if evidence concerning the 1996 Exam were deemed to be inadmissible, this would not affect the propriety of intervention by the MAMLEO applicants.[1/]

iii. The petitioners repeatedly contend that the MAMLEO intervenors "seek to offer an 'interest' of their own in order to satisfy the compelling governmental interest prong of strict scrutiny on behalf of the governmental actors . . . . in order to circumvent strict scrutiny." *E.g.*, Pet. Br. at 3-4, 9-17. Respondents respectfully submit that eliminating the effects of discrimination constitutes a compelling governmental interest, whether asserted by the government or by a private party, and that the presence of the MAMLEO intervenors in this case does

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[1/]Petitioners' repeated accusations of collusion, *see, e.g.*, Pet. Br. at 7, 13-14, 16, also are baseless, and appear to be rooted in a fundamental misunderstanding about the nature of affirmative action litigation. For example, petitioners seem to argue that collusion and bad faith on the part of the defendants is demonstrated where a defendant acknowledges the existence of discrimination. *See* Pet. Br. at 15-16. It is black-letter law, however, that, in order to justify affirmative action, the defendant must show a "strong basis in evidence" for the defendant's belief that remedial measures were warranted. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality). Thus, the existence of discrimination is simply part of the defendant's defense in a reverse-discrimination case. *Id.* at 274 ("some showing of prior discrimination by the governmental unit involved" is required in order to demonstrate a compelling interest).

not relieve the governmental defendants of their burden to satisfy the requirements of the Fourteenth Amendment.

iv. Petitioners' conclusion that the governmental defendants have no "possibility of meeting the compelling governmental interest requirement of strict scrutiny" Pet. Br. at p.14, is entirely speculative and does not render intervention improper.

v. Finally, this litigation is in the discovery stage and, as such, the defendants' arguments, and the factual bases therefor, in defense of the actions challenged by the petitioners have yet to be fully developed by the defendants, let alone briefed by the defendants, ruled on by the district court, and reviewed by the court of appeals. At this stage, the petitioners' contentions concerning the intentions and litigation strategies of the defendants in this case, as well as their contentions concerning what evidence does and does not exist and what it does or does not prove, constitute speculation, which is inappropriate for review by this Court. *See Thomas v. Union Carbide*, 473 U.S. 568, 579 (1985) ("disputes or questions which involve uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all must not be granted certiorari").

c. Petitioners' question four asks this Court to decide whether an intervenor can introduce "post-enactment evidence" to justify the use of race by a governmental actor. Because this is an evidentiary question that has yet to be decided by district court and reviewed by the court of appeals, it does not warrant certiorari review. *See* Supreme Court Rule 11 and cases cited in section 1b, *supra*.

Clearly, the relevance and admissibility of evidence concerning the examination process is best addressed on the basis of a more complete record after the close of discovery. Moreover, the petitioners argument on the merits reads too much into *Shaw v. Hunt*, 517 U.S. 899 (1996). *Shaw* did not address

the discoverability or admissibility of "post-enactment evidence" but rather the *sufficiency* of such evidence, a question that has not been decided by either the district court or the court of appeals in this case.

Finally, every circuit court that has directly addressed the question of post-enactment evidence has held that it is admissible. *See Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir. 1994); *Contractors Ass'n of Eastern Pennsylvania v. Philadelphia*, 6 F.3d 990 (3d Cir. 1993); *Harrison & Burrowes Bridge Constr., Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

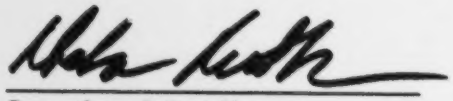
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE and HAROLD WHITE,

By their attorneys,



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